Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

REBECCA GARCIA, ET AL.,

Petitioners,

v.

CONOCO, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petition presents the following questions:

I. Petitioners filed suit against Respondents in Texas state court to recover damages arising from prolonged exposure to materials propagated during uranium mining and milling operations. The case was removed to federal district court, relying upon the Price-Anderson Act, 42 U.S.C. § 2210, as basis for subject matter jurisdiction. Are damages contracted from long term exposure to products spawned from uranium mining and milling operations a "public liability action", that confer removal jurisdiction under the Price-Anderson Act?

II. As result of the prolonged exposure to uranium mining and milling products, Petitioners contracted various diseases, including pneumoconiosis (silicosis). Even after producing an extensive affidavit from a qualified medical expert that unequivocally validated causation, the federal district court resolved that insufficient to even confirm *prima facie* causation. Did Petitioners' establish *prima facie* causation?

III. The federal district court dismissed Petitioners' claims against Respondents, with prejudice. Does the removal to federal district court and ultimate dismissal with prejudice violate the Fifth and Fourteenth Amendments of the United States Constitution which guarantees access to State courts, equal protection of the laws, and due process?

LIST OF PARTIES

The Parties to the proceeding below are the following:

1. Petitioners: Rebecca Garcia, and 614 additional individuals (complete list of Petitioners is contained in appendix, A-42).

2. Respondents: Conoco, Inc., Conquista Project Corporation; Continental Oil Co.; Chevron Corporation; Chevron Resources; Exxon Corporation; USX Corporation; General Atomics, d/b/a General Atomics Corp.; Totale Inc.; Chemical Waste Management Inc.; Chemical Waste Management of Texas, Inc.; Totale Corporation; Total American Mining, Inc.; Malapai Resources Company; Everest Minerals Corporation; Pioneer Corporation; Pioneer Nuclear Inc.; Atlantic Richfield Company; Susquehanna-Western Inc.; Rio Grande Resources Corporation; Intercontinental Energy Corporation; Uranium Resources Inc.; Gilbert Construction Company of Texas, Inc.; Gilbert Construction Company, II; Gilbert Construction Company; Oxy Minerals Corporation; Mo-Vac Incorporated; E.G. Gonzales Trucking and Paving; Buddy Smith Drilling Company; Garcia Construction; Bay Inc., d/b/a Bay Materials; Dahlstrom Construction Co.; Dahlstrom International Inc.; Dahlstrom Enterprises Inc.; Dahlstrom Holding Corporation;

LIST OF PARTIES – Continued

Dahlstrom Trucking Company, Inc.; Havanna Inc. d/b/a Havanna Materials; Heldenfels Brothers Inc.; International Engineering Company; Scott Davidson Trucking; Davidson Construction and Trucking; Marcos Garcia; G.P. Materials Inc.; McKenzie Contractors Inc.; McKenzie Materials Inc.; Brown & Root, Inc.; Lone Star Drilling Corporation; Lone Star State Drilling Corporation; Lone Star Foundation Inc.; Lone Star Drilling Company; Beackley Drilling; Tepcore Drilling Inc.; Chem-Waste Management; Redgy Suyllivan Drilling; Century Geophysical Mobile Service; Anaconda Company; Pawalex Supply; DSI; Westinghouse Electric Corporation; Rex Lilly Sandblasting; Wyoming Minerals; Greyback Consolidated Inc.; Buckaloo Inc.; Analog; Herbie McNitch Waterwell Services; and John Doe Companies

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, in its Cause No. 98-51133, rendered January 11, 2000.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit and its opinion, reported at 200 F.3d 335 (5th Cir. 2000), are reproduced in the Appendix to this petition, p. A-1. The order of dismissal from the United States District Court, Western District of Texas, and its opinion are reproduced in the Appendix to this petition, p. A-16.

STATEMENT OF JURISDICTION

The judgment and opinion which this Court is asked to review were rendered on January 11, 2000 by the United States Court of Appeals for the Fifth Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature of the Case

This is a civil action brought by nearly 600 Petitioners in Texas state court, to recover damages for debilitating personal injuries to these Texas residents, caused by long-term exposure to radioactive and other materials released during uranium mining and milling activities. The order of dismissal was entered by the United States District Court for the Western District of Texas (Appendix, p.

A-16). That dismissal was affirmed by the United States Court of Appeals for the Fifth Circuit. (Appendix, p. A-1).

Facts

Because they lived and worked around Respondents' uranium mining and milling operations for extended periods of time, some as long as 30-40 years, Petitioners now suffer from appalling, painful and often life threatening diseases such as pneumoconiosis (silicosis), dysfunctional cellular immune response, pulmonary injuries, porphyria and kidney disease. (Appendix, p. A-32). As a result of this exposure and resulting damages, Petitioners filed suit in Texas state court, asserting causes of action under state law.

Notwithstanding, the case was removed to federal district court in San Antonio, based upon spurious assertions that damages sustained from long-term exposures to uranium mining and milling operations was a "public liability action", and therefore removable under the Price-Anderson Act. Petitioners timely filed their Motion to Remand, complaining of the lack of subject matter jurisdiction. (Appendix, p. A-18). After denial of the Motion to Remand, the case was assigned to a Magistrate Judge for pre-trial matters, and he entered an extensive "scheduling" order that required Petitioners to produce expert affidavits, as proof of *prima facie* causation.[1] (Appendix, p. A-21).

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[1] Prior to any disclosure or discovery, the Scheduling Order also required: (1) identification of the precise chemicals and other compounds to which each plaintiff was exposed; (2) quantification of precise times of exposure; (3) calculation of explicit levels of exposure; and (4) marshalling all evidence validating Respondents' egregious activities, events and conduct. (Appendix, p. A-21). The resulting effect was to absolve Respondents from responsibility to produce necessary

After extensive testing and medical examinations, a comprehensive affidavit was submitted detailing each Petitioners' illnesses (Appendix, p. A-32). Despite the lack of subject matter jurisdiction and in the face of overwhelming evidence that substantiated causation, the federal district court summarily dismissed Petitioners' causes of action with prejudice. (Appendix, pp. A-16, A-54). That dismissal with prejudice was affirmed by the Fifth Circuit. (Appendix, p. A-1).

REASONS FOR GRANTING THE WRIT

Even though removal jurisdiction was asserted under shroud of the Price-Anderson Act, no such subject matter jurisdiction exists. Explicitly, this Court has determined Price-Anderson Act would not apply to the uranium mining and milling operations that were the source of contamination, because Respondents had no indemnification agreement with the federal government.[2] In addition to lack of an indemnification agreement, as acknowledged by other federal courts, Price-Anderson does not confer subject matter jurisdiction because: (1) there was no "occurrence" (no unintended escape or release of nuclear energy);[3] (2) there was no nuclear incident;[4] and (3) the

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documents through required disclosure or discovery that would establish negligence and affirm causation.

[2] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-52, 251 n.12 (1984).

[3] *Gilberg v. Stepan Co.*, 24 F.Supp.2d 325, 335 (D.N.J. 1998); *In re Cincinnati Radiation Litig.*, 874 F.Supp. 796, 832 (S.D.Ohio 1995).

[4] *Id.*

mining and milling operations were not licensed by the Nuclear Regulatory Commission (NRC).[5]

Moreover, the expert affidavit substantiated *prima facie* causation. The affidavit of Dr. Charles Smith, a licensed medical doctor, identified specific illnesses caused by exposure to uranium mining and milling operations. (Appendix, p. A-32). Since the testing, cited scientific literature and affidavits absolutely confirmed *prima facie* causation, dismissal was not justified.

Due Process

United States citizens have a fundamental right to pursue claims in state courts. These rights arise under the Petition Clause of the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and the Due Process Clause of the Fifth Amendment to the United States Constitution.

The Petition Clause encompasses not only the right of access to the legislative branch, but also the right of access to the courts.[6] The same ideals of liberty and democracy that resulted in the freedoms to speak, publish and assemble also inspired the Petition Clause and are inseparable First Amendment rights.[7] While the text of the First Amendment refers to Congress, the First Amendment also applies to the states through the Due

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[5] 42 U.S.C § 2220(b) (1995); TEXAS HEALTH & SAFETY CODE ANN. § 401.011 *et seq.* (Vernon 1992).

[6] *California Motor Transport Co. v. Trucking, Unlimited*, 404 U.S. 508, 510 (1972); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

[7] *McDonald v. Smith*, 472 U.S. 479, 485 (1985).

Process Clause of the Fourteenth Amendment.[8] Thus, the right of access to state courts derives both from the First Amendment Petition Clause and from the Fourteenth Amendment itself.[9]

The right to due process reflects a fundamental value in our American constitutional system.[10] These due process rights are inherent in both the Fifth and Fourteenth Amendments. Access to the state courts is the foundation of the rule of law. Prohibiting Petitioners from pursuing their claims in state court, by improperly imposing federal subject matter jurisdiction was a clear violation of due process.

Further, the burden placed upon Petitioners by the federal district court to present their entire case without benefit of discovery, was both onerous and improper. Such burden was a clear violation of the due process rights guaranteed by the Fifth Amendment.

Uranium mining is not indemnified in Price-Anderson

Removal was based solely upon Respondents' assertion that subject matter (removal) jurisdiction was provided by Price-Anderson. But, absent indemnification, there is no such allowance:

> . . . the Price-Anderson Act, an amendment to the Atomic Energy Act . . . established an indemnification scheme under which operators of licensed nuclear facilities could be required to obtain up to $60 million in private financial protection against such suits. The government would then provide indemnification, for the

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[8] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1, (1966).

[9] *See Bieregu v. Reno*, 59 F.3d 1445, 1453-54 (3rd Cir. 1995).

[10] *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

> next $500 million of liability, and the resulting $560 million would be the limit of liability for any one nuclear incident.[11]

As review of the history of Price-Anderson confirms, the NRC does not now require, nor has ever required, uranium mine owners or operators to maintain financial protection. The government only provides indemnification to those required to maintain financial protection, and Price-Anderson applies only to those indemnified.[12] Respondents did not have an indemnity agreement with the federal government, were not required to maintain Price-Anderson's financial protection, and therefore were not beneficiaries of the indemnification protection provided by Price-Anderson.

In *Silkwood*, a diversity case, the issue was whether federal regulation of the nuclear energy industry under Price-Anderson preempted an award of punitive damages under state law. After tracing the long history of the Act, this Court determined Price-Anderson did not apply because the "NRC did not require plutonium processing plants to maintain financial protection." Specifically, in *Silkwood* this Court explained that "the Price-Anderson Act did not apply" because at the time of the "escape" which formed the basis of that lawsuit, the (Kerr-McGee) plutonium facility was not required to maintain financial protection and not subject to an indemnification agreement.[13] Even in dissent, Mr. Justice Powell admitted unequivocally that "[Price-Anderson] did not apply at all to the Kerr-McGee plant at the time of this incident."[14]

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[11] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 239, 251-52, 251 n.12 (1984).

[12] *Id.*

[13] *Id.*

[14] *Id.*, 464 U.S. at 279 (Powell, J. dissenting).

Correspondingly, the uranium mining and milling activities here, like the plutonium processing plant in *Silkwood*, were not subject to an indemnification agreement nor required by the NRC to maintain financial protection. Consequently, since Price-Anderson does not apply, then the removal provisions added in the 1988 Amendments to the Price-Anderson Act would similarly not apply.

Uranium mining is not a "public liability action"

Some circuits have applied Price-Anderson to confer subject matter jurisdiction, but only for individuals exposed to radiation unintentionally released from nuclear power plants that were required to provide financial protection and that had an indemnification agreement with the NRC. Under those facts, Price-Anderson would control because there was a "public liability action": (1) an "occurrence" (unintended release of nuclear energy from a nuclear power plant); (2) a "nuclear incident"; and (3) the facility had an indemnification agreement with the NRC.[15] But, none of those facts are present here.

Only two federal courts have addressed the specific issue in this case, whether or not damages from long term exposure to products spawned from mining and milling of radioactive materials constitute a "public liability action" governed by the Price-Anderson Act, which confers removal jurisdiction. A federal district court in New Jersey, relying upon *Silkwood*, concluded that there could be no "public liability action," and therefore no preemptive federal subject matter jurisdiction under Price-Anderson, absent an indemnification agreement with the federal government.[16]

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[15] *In re TMI II*, 940 F.2d 832, 854 (3rd Cir. 1991).

[16] *Gilberg v. Stepan Co.*, 24 F.Supp.2d 325, 335 (D. N.J. 1998).

In contrast, a federal district court in the Northern District of Illinois determined that Price-Anderson would apply, even without an indemnification agreement. However, recognizing that *Gilberg* "presents a thoughtful and exhaustive examination of the statute . . . ," the Illinois court certified that question to the United States Court of Appeals for the Seventh Circuit.[17]

Uranium mining is not a nuclear incident

Notwithstanding the indemnification requirement for applicability of Price-Anderson, the removal provisions in the 1988 Amendments to the Price-Anderson Act were never intended to provide federal subject matter jurisdiction for damages resulting from uranium mining and milling operations. Even after those amendments, before an "occurrence" qualifies as a "nuclear incident," the escape or release of nuclear material must be unintended and occur in connection with an indemnified activity.[18]

Nuclear incident requires an occurrence

The explicit words of the Atomic Energy Act define a "nuclear incident" as "any occurrence, including an extraordinary nuclear occurrence" causing bodily injury.[19] Of particular importance is the term "occurrence," because if Petitioners' claims are not an "occurrence," then this is not a "nuclear incident" and the preemptive subject matter jurisdiction provisions of Price-Anderson cannot apply.

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[17] *Carey v. Kerr-McGee Chemical LLC*, No. 96-C8583, 1999 WL 966484 (N.D. Ill. Sept. 30, 1999).

[18] *In re Cincinnati Radiation Litig.*, 874 F.Supp. 796, 832 (S.D. Ohio 1995).

[19] 42 U.S.C. § 2014(q) (1995).

> To summarize, preemption under Price-Anderson sweeps broadly to include any claim alleging "public liability," that is, "any legal liability arising out of or resulting from a nuclear incident." § 2014(w). **For there to be a nuclear incident, however, there must be an "occurrence,"** and an occurrence under the Act can only be an "event . . . [at] 'the location' of 'the contract location' as defined in the applicable . . . indemnity agreement, entered into pursuant to section 2210." § 2014(j) & (q). **No such agreement covers the [mining and milling operations]. Therefore, no event alleged by plaintiff can constitute an "occurrence." Plaintiff's action, therefore, is not "one based on 'any legal liability' of 'any person who may be liable on account of a nuclear incident,' "** *TMI II*, 940 F.2d at 854, **and cannot be removed pursuant to 42 U.S.C. § 2210(n)(2).**[20]

Considered in isolation, "occurrence" could be understood to include any event or happening. However, fundamental principles of statutory construction dictate that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.[21] "Occurrence," therefore, must be read in accordance with the clause "including an extraordinary nuclear occurrence."[22]

Extraordinary nuclear occurrence ("ENO") is statutorily defined as "any event causing a discharge or dispersal of . . . [nuclear material] . . . which the [NRC] . . . determines to be substantial . . . and . . . which the [NRC] . . . determines has resulted or will result in substantial damages to persons offsite. . . . " Moreover,

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[20] *Gilberg*, 24 F.Supp.2d at 339-40 (emphasis supplied).

[21] *Deal v. United States*, 508 U.S. 129, 132 (1994).

[22] 42 U.S.C. § 2014(q) (1995).

"offsite" means "away from 'the location' or 'the contract location' as *defined in the applicable Nuclear Regulatory Commission . . . indemnity agreement . . .* "[23] Thus, an indemnity agreement is clearly a predicate to an ENO.

Another rule of interpretation requires that identical words used in different parts of the same statute are intended to have the same meaning.[24] Thus, because of proximity to and interrelationship between *"occurrence"* and "extraordinary nuclear *occurrence,"* the two terms were meant to have similar meanings. "Occurrence" in the definition of ENO is predicated on an indemnity agreement with the NRC; thus, as a matter of statutory construction, the "occurrence" which underlies a "nuclear incident" was intended to be restricted to events at "the location" or "the contract location," as that term is defined in an indemnity agreement.[25]

An indemnity agreement, therefore, is also a predicate for an "occurrence" and consequently a "nuclear incident" under Price-Anderson. Such interpretation, besides being founded upon well-established principles of statutory construction, is also consistent with Price-Anderson's history and statutory framework. The Act was intended to cover nuclear accidents taking place on facilities indemnified under its liability scheme, not uranium mining facilities. Accordingly, because Respondents' uranium mining activities did not have an indemnification agreement with the NRC, there was no "occurrence," no "nuclear incidents," and therefore no applicability of Price-Anderson.[26]

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[23] 42 U.S.C. § 2014(j) (1995).

[24] *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

[25] *Gilberg*, 24 F.Supp.2d at 332.

[26] *Gilberg*, 24 F.Supp.2d at 335; *In re Cincinnati Radiation Litig.*, 874 F.Supp. at 832.

Nuclear incident requires unintended escape or release of nuclear energy

One of the few courts that have dealt directly with application of Price-Anderson to removal of state claims for damages from other than nuclear power plants is the district court of the Southern District of Ohio. That court determined that a "nuclear incident" cannot occur when there is no unintended escape or release of nuclear energy from a nuclear facility. Therefore, Price-Anderson cannot apply here because the uranium mining activities were conducted as intended, without an unintended escape or release.[27]

Uranium mining was never included in Price-Anderson

Price-Anderson was never intended to apply to uranium mining activities, based upon the belief that uranium mining did not pose the grave dangers to the public that nuclear reactors posed. Affirmation that Congress never intended Price-Anderson to cover uranium mining activities is found in review of the legislative history of the 1957 Price-Anderson Act, as well as the Atomic Energy Act, which never even mentioned uranium mining.

Atomic Energy Act of 1946

The history behind the Price-Anderson Act begins with the passage of the Atomic Energy Act of 1946. Then, Congress contemplated that the development of nuclear power would be a governmental monopoly. However, both technological and political developments in the decade that followed demanded a wholesale revision of

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[27] *In re Cincinnati Radiation Litig.*, 874 F.Supp. at 832.

federal atomic policy. Thus, Congress amended and recodified its policy in the Atomic Energy Act of 1954.[28]

Atomic Energy Act of 1954

Congress passed the Atomic Energy Act of 1954 in order to encourage the entrance of private industry into the atomic energy program and speed the further development of peaceful uses of atomic energy. Under strict federal regulation and licensing by the Atomic Energy Commission, the private sector was allowed to build and construct nuclear power reactors for energy production.[29] While this act provided for regulation of nuclear power plant construction and operation, it had no provisions relating directly to uranium mining.

Although the Atomic Energy Commission offered incentives to encourage private investment, "there remained in the path of the private nuclear power industry various problems – the risk of potentially vast liability in the event of a nuclear accident of a sizable magnitude being the major obstacle." Private industry and the Atomic Energy Commission were confident that such a disaster would not occur, but the danger remained "and the potential liability dwarfed the ability of the insurance companies to absorb the risk."[30] Indeed, the private sector informed Congress that they would be forced to withdraw from nuclear power unless their potential liability could somehow be limited.[31]

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[28] *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 63 (1978).

[29] *Id.*

[30] *Id.*, at 64.

[31] *Id.*

Price-Anderson Act of 1957

Congress responded to the private sector's concerns of unlimited liability by passing the Price-Anderson Act in 1957; also known as the Atomic Energy Damages Act. By limiting the aggregate liability for a single nuclear incident to $500 million plus the amount of liability insurance available on the private market, Price-Anderson had the dual purpose of "protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry."[32] In effect, the private nuclear power plant industry was required to purchase the maximum amount of liability insurance on the open market, and if damages resulting from a nuclear power plant disaster exceeded that amount, the federal government would indemnify the licensee up to a maximum of $500 million. Again, the 1957 Price-Anderson Act did not mention uranium mining.[33]

Under the Act, those desiring a license for the construction or operation of nuclear power facilities were required to enter into an indemnification agreement with the Atomic Energy Commission and maintain the appropriate amount of insurance.[34] However, while the Atomic Energy Commission was authorized to license the production and possession of nuclear materials, Price-Anderson did not require those material licensees to maintain insurance nor enter into an indemnification agreement.[35] Instead, the Act gave the Commission discretion to require financial protection and indemnify those contractors it determined to be engaged in activities that

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[32] 42 U.S.C. § 2012(i) (1995).

[33] *Duke Power Co.*, 438 U.S. at 64-65.

[34] 42 U.S.C. § 2210(c) (1995).

[35] Price-Anderson Act, sec. 4, § 170(a), reprinted in 1957 U.S.C.C.A.N. at 630.

involved the risk of a substantial nuclear accident.[36] Uranium mining activities, moreover, were not required by the Commission to comply with Price-Anderson and did not have to maintain insurance nor agree to indemnification.

Another significant feature of the Price-Anderson Act of 1957 was the limited involvement of the federal courts. While the Act did identify the realm of compensable claims, it did not create a federal cause of action nor provide a federal forum for the resolution of claims. Instead, liability and the measure of damages arising from nuclear incidents was to be determined by state law, and jurisdiction to decide those claims remained in the province of the state courts.[37]

1966 Amendments

Congressional concern that two different victims of a serious nuclear incident might be subjected to different substantive and procedural laws by reason of an "invisible state boundary" led to the 1966 Amendments of the Act. At that time, state tort law dealing with liability for nuclear accidents was unsettled, and there was no assurance that all state courts would impose a rule of strict liability in the event of a serious nuclear disaster. Without strict liability, an injured plaintiff unable to prove negligence would not be compensated.[38]

Thus, the 1966 Amendments provided for a waiver of defenses in the event of an *extraordinary nuclear occurrence* ("ENO"). In addition, the amendments provided for

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[36] 42 U.S.C. § 2210(d) (1995).

[37] *Gilberg*, 24 F.Supp.2d at 335; *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 492-94 (3rd Cir. 1986).

[38] *Gilberg*, 24 F.Supp.2d at 336-37 (quoting S.Rep. No. 89-1605 reprinted in 1966 U.S.C.C.A.N. at 3208).

emergency assistance payments, non-waiver of defenses in other nuclear incidents, and consolidation of suits after an *extraordinary nuclear occurrence*. Of particular importance, the "consolidation of suits" provision is the precursor to the current removal statute.

Another significant aspect of the 1966 Amendment is that ordinary "nuclear incidents" continued to be handled by state courts in accordance with state tort law. Federal courts, therefore, could only intervene in the event of an extraordinary nuclear occurrence, or in the event of a non-extraordinary occurrence when it appeared that the federal indemnity pot of $500 million would be exceeded.[39] Once again, the motivation for the 1966 Amendments was the extreme dangers and liabilities of a nuclear power plant disaster. Still, uranium mining was not mentioned nor considered.

1975 Amendments

In 1975, Congress once again amended and extended the Price-Anderson Act by revising the federal-private sector indemnity scheme. Still, this amendment did not mention uranium mining. Nuclear power, at that point in time, had grown up and was a profitable operation. Thus, operators of large nuclear power plants were required by the 1975 Amendments to contribute to an indemnity fund, while the federal government diminished its role. As of 1978, for example, in the event of a nuclear incident causing $560 million or more in damages, $315 million would be paid from contributions by licensees of the 63 private operating nuclear power plants. Another $140 million would be paid by private insurance maintained

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[39] *Id.*, at 338.

by the licensee, and the remaining $105 million would be borne by the federal government.[40]

Three Mile Island (TMI)

The first real test of the Price-Anderson statutory scheme occurred four years later at Three-Mile Island ("TMI"), a nuclear power facility near Harrisburg, Pennsylvania. On March 28, 1979, the TMI nuclear power facility released radiation into the atmosphere, injuring thousands of area residents and businesses within a twenty-five mile radius of the facility.[41]

The TMI release generated in excess of 150 separate cases, filed in various state and federal courts.[42] Even with this phenomenal release of radiation directly into the atmosphere, the Nuclear Regulatory Commission (successor to the Atomic Energy Commission) determined that the TMI incident did not constitute an "extraordinary nuclear occurrence," and therefore was not protected by the Price-Anderson Act. Federal courts, therefore, did not have subject matter jurisdiction over TMI-related cases under the Price-Anderson Act.[43]

1988 Amendments

When Congress considered whether to re-authorize the Price-Anderson Act in 1988, TMI cases had cost approximately $50 million, of which 85% was paid for claims. At the state court level, there was no clear method for handling the influx of cases, nor a uniform standard

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[40] *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 57, 67 (1978).

[41] *In re TMI III*, 67 F.3d 1103, 1105 (3rd Cir. 1995).

[42] *Gilberg*, 24 F.Supp.2d at 338.

[43] *Kiick v. Metro Edison Co.*, 784 F.2d 490, 495 (3rd Cir. 1986).

for compensating injured plaintiffs. Moreover, two thousand additional personal injury cases were still winding their way through the judicial system nearly a decade after the incident.[44]

It was the inefficiency of having TMI claims determined and litigated separately by different courts in different states which led Congress to enact the 1988 Amendments to the Act. Indeed, the 1988 Amendments made two jurisdictional changes to Price-Anderson designed to prevent complications and delays in future litigation.

First, the amendments expressly created a federal cause of action under the Act for "public liability actions" arising out of a nuclear incident, which effectively preempted any state cause of action previously available.[45] However, even that new federal cause of action did not expand the scope of claims compensable under the Act.[46]

Second and more importantly, the 1988 Amendments substituted the phrase "nuclear incident" for "extraordinary nuclear occurrence" in the Act's jurisdictional provision.[47] This jurisdictional expansion was retroactively effective, and allowed all the previously scattered TMI cases, which did not qualify as ENO but did qualify as a "nuclear incident," to be removed to and consolidated in the Middle District of Pennsylvania.[48]

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[44] Price-Anderson Amendment Act of 1988, S.Rep. 100-70, 100th Cong., 2nd Sess., reprinted in 1988 U.S.C.C.A.N. 1424, 1428.

[45] *In re TMI II*, 940 F.2d 832, 857 (3rd Cir. 1991).

[46] *Gilberg*, 24 F.Supp.2d at 339.

[47] Price-Anderson Amendments Act of 1988, Pub.L. 100-408, sec. 11(b), § 11(hh), 102 Stat. 1066, 1076 (codified at 42 U.S.C.A. § 2014(hh)).

[48] *In re TMI III*, 67 F.3d 1103, 1105 (3rd Cir. 1995).

Once again, the legislative history explains the rationale for this change:

> Under current law, only claims arising from an extraordinary nuclear occurrence may be consolidated in federal court. In litigation following the Three-Mile Island accident, the U.S. Court of Appeals for the Third Circuit held that federal courts do not have subject matter jurisdiction of claims arising out of a non-extraordinary nuclear occurrence.[49] The bill expands existing law to allow for the consolidation of claims arising out of any nuclear incident in federal district court.
>
> The experience with claims following the TMI accident demonstrates the advantages of the ability to consolidate claims after the nuclear incident. Attorneys representing both plaintiffs and defendants in the TMI litigation testified before the Committee that the ability to consolidate cases in federal court would greatly benefit the process for determining compensation for claimants. The TMI accident, which was not an extraordinary nuclear occurrence, has resulted in over 150 separate cases against TMI defendants, with over 3,000 claimants in various state and federal courts. Many of the issues in these cases are similar. The availability of the provisions for consolidation of claims in the event of any nuclear incident, not just an extraordinary nuclear incident, would avoid the inefficiencies resulting from duplicative determinations of

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[49] *Stibitz v. GPU*, 746 F.2d 993 (3rd Cir. 1984), *cert. denied*, 105 S.Ct. 1187 (1985).

similar issues in multiple jurisdictions that may occur in the absence of consolidation.[50]

Certainly, the Price-Anderson Act today provides federal preemptive subject matter jurisdiction over "any public liability action arising out of or resulting from a nuclear incident."[51] But, even this expanded inclusion of any "nuclear incident," was never intended to cover uranium mining and in fact does not apply to uranium mining activities.[52]

Such application is evident from the Act's legislative history, discussed above, which never mentioned uranium mining, and also from the interpretation of the courts. Instead, Congress intended to shelter the nuclear power industry from the serious risks and problems associated with production of nuclear power, including the construction and operation of nuclear power plants. At any time, Congress could have, but chose not to, include uranium mining in the Act's coverage. Indeed, neither the Atomic Energy Act, the Price-Anderson Act, nor any of its amendments evidence a change from the original policy of leaving jurisdiction over uranium mining to the states.

The NRC ceded all regulatory authority to Texas

Under the "agreement with states program," any state that enters into an agreement with the NRC, discontinues the NRC's regulatory authority under the Atomic

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[50] Price-Anderson Amendment Act of 1988, S.Rep. 100-218, 100th Cong., 2nd Sess., reprinted in 1988 U.S.C.C.A.N. 1476, 1488.

[51] 42 U.S.C. § 2210(n)(2) (1995).

[52] *In re Cincinnati Radiation*, 874 F.Supp. 796, 832 (S.D. Ohio 1995).

Energy Act for the following materials: byproduct materials, source materials, and special nuclear material.

> During the duration of such an agreement, it is recognized that the state has authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.[53]

Because Texas is an agreement state, the NRC relinquished its regulatory authority to Texas over the same uranium mining and milling operations, including byproduct and source material, that are the basis of this lawsuit.[54] Accordingly, Petitioners' claims for damages from exposure to radioactive materials naturally released from the byproduct and source material during uranium mining and milling operations is simply not an action under the Atomic Energy Act. Because Price-Anderson is an amendment to the Atomic Energy Act, Price-Anderson

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[53] "Except as provided in subsection (c) of this Section, the Commission is authorized to enter into agreements with the governor of any state providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII, of this division, and Section 2201 of this Title, with respect to any one or more of the following materials within the state:

1. byproduct materials as defined in Section 2014(e)(1) of this Title;
2. byproduct materials as defined in Section 2014(e)(2) of this Title;
3. source materials; and
4. special nuclear materials in quantities not sufficient to form a critical mass."

42 U.S.C. § 2021(b) (1995).

[54] TEXAS HEALTH & SAFETY CODE ANN. § 401.011 *et seq.* (Vernon 1992); TEXAS NAT. RES. CODE ANN. § 131.001 *et seq.* (Vernon 1993).

also does not apply, no subject matter jurisdiction exists, and Petitioners' claims were not properly removable to federal court.

Since Texas is an agreement state, sections 2071, 2093 and 2011, which pertain to byproduct materials, source materials, and special nuclear material, are not licensed or controlled by the NRC.[55] Instead, by agreement the licenses are provided by the State of Texas and no license was issued to Respondents under any other section or provision of the Atomic Energy Act. Clearly, absent applicability of the licensing requirements of the Atomic Energy Act, the indemnification and limitation of liability provisions of the Price-Anderson amendments to the Atomic Energy Act do not apply and no federal subject matter jurisdiction exists.

Texas Radiation Control Agency

Under § 401.011(a)&(b) of the Texas Health and Safety Code, the Texas Radiation Control Agency has *jurisdiction* to regulate and *license*:

1. disposal of radioactive substances, and
2. the recovery and processing of source material.

"Radioactive substances" are defined under § 401.003(19) to include: (a) byproduct material; (b) naturally occurring radioactive material wastes, excluding oil and gas wastes; (c) radioactive material; (d) radioactive wastes; (e) source material; (f) sources of radiation; and (g) special nuclear material. Correspondingly, "Source material," under subsection 22 means: (a) uranium, thorium, or other material that the governor by order declares to be source material after the federal commission has determined the material to be source material; or

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[55] 42 U.S.C. § 2210(a) (1995).

(b) that contains one or more of the materials listed in subsection (a) to the degree of concentration that the governor by order declares to be source material after the federal commission has determined the material to be a degree of concentration to be source material. "Byproduct," under subsection 3 means: (a) a radioactive material, other than special nuclear material, that is produced in or made radioactive by exposure to radiation incident to the process of producing or using special nuclear material; and (b) tailings or wastes produced by or resulting from the extraction or concentration of uranium or thorium from ore processed primarily for its source material content, including discreet surface wastes resulting from uranium solution extraction processes, and other tailings having similar radiological characteristics. Since Texas is an agreement state, Price-Anderson does not apply to this case.

Prima facie causation was established

It is important to note that the federal district court did not conduct a "gate keeper" analysis, and made no determination that Petitioners' experts were not qualified. Instead, the court simply refused to recognize the contents of the affidavits as sufficient to establish *prima facie* causation.

Under the threshold established by the Fifth Circuit, the facts required to sustain a plaintiff's burden of causation in toxic tort cases have been confined to "scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities."[56] More precisely, Fifth Circuit law mandates

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[56] *Allen v. Pennsylvania Eng. Corp.*, 102 F.3d 194, 199 (5th Cir. 1996).

plaintiffs prove both general and specific causation.[57] Typically, when uranium exposure puts an identifiable population group at increased risk, causation exists merely when a member of that group develops a biological condition consistent with the hazard. In fact, such exposure and illness results in a presumption of causation "absent persuasive proof to the contrary offered by the defendant."[58]

Dr. Charles Smith, M.D.

Dr. Charles Smith is a licensed medical doctor that rendered causation opinions based upon examinations, scientific data, tests, medical authorities and other information available to him. In his affidavit, Dr. Smith specified: (a) tests run on Petitioners, (b) the purpose and results of each test, (c) individuals with direct and indirect exposure to uranium mining and milling operations, (d) the toxic proclivity of the materials to which individuals were exposed, (e) the minimum toxic dosages of the chemicals required for the particular illnesses, (f) the minimum toxic dosages to which Petitioners were exposed, (g) the durations of exposure, and (h) description of each disease producing sequentially from exposure. Dr. Smith's opinions, based upon reasonable medical probability, were that Petitioners' illnesses were caused by exposure to the products produced by Respondents' uranium mining and milling operations. (Appendix, p. A-32).

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[57] *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 313 (5th Cir. 1988), *modified*, 884 F.2d 166 (5th Cir. 1989).

[58] *Allen v. United States*, 588 F.Supp. 247, 415 (C.D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987).

Before providing the affidavit evidence, Dr. Smith: (1) reviewed results of extensive soil sampling, (2) interviewed Petitioners, (3) tested and examined Petitioners, (4) reviewed medical records and test results, and (5) analyzed relevant scientific literature. Only then was the expert able to affix causation for the illnesses suffered by Petitioners and prepare the necessary affidavit.

The affidavit clearly delineated the *particular* illnesses and conditions attributable to each Petitioners' exposure to the mining and milling operations, Petitioners' dosages and exposures, and the minimum dosages and exposures required for the illnesses. There can be no dispute that Petitioners did in fact establish *prima facie* causation.[59]

The court requirements imposed were never designed nor intended to be a "gate keeper" review of ultimate qualification of experts or admissibility of testimony. Instead, Petitioners were only required to establish *prima facie* causation, and have done so with a qualified expert, whose opinion was rendered after examination of Petitioners, review of testing materials, and pertinent, competent scientific literature. Even under a "gate keeper" analysis, Petitioners' expert and testimony were more than sufficient.

General causation

General causation means only that exposure to the chemicals and toxic substances from the mining and milling operations could cause the illnesses identified by these Petitioners.[60] Here, general causation was established by the cited scientific literature, which clearly delineated that the types of injuries suffered by these Petitioners are caused by exposure to the radiation and

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[59] *Carroll v. Morgan*, 17 F.3d 787, 789-90 (5th Cir. 1994).

[60] *Brock*, 874 F.2d at 313.

related products released during Respondents' mining and milling operations.

As example, in his affidavit, Dr. Smith cited specific scientific textbooks and literature which confirmed that the specified illnesses suffered by Petitioners are in fact caused by exposure to the products of uranium mining and milling operations. Undeniably, the affidavit testimony and cited scientific literature confirmed general causation.

Specific causation

Under the guidelines imposed by the Fifth Circuit, proof of causation only requires testimony that exposure to these substances was a "substantial factor" in causing the injuries of these specific Petitioners.[61] Conclusively, specific causation can be established by medical testimony from a medical doctor, such as Dr. Smith.[62]

> The Fifth Circuit has held that medical testimony on the issue of specific causation satisfies *Daubert*[63] if the doctor bases his opinions on an examination (or a review of the medical

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[61] *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985).

[62] Petitioners are not required to prove that the injury would not have happened "but for" Respondents' products or that the product was the sole cause of the illness. Instead, under the "substantial factor" test, applied in mass toxic tort cases, Petitioners need only show that exposure to the uranium mining products was a substantial factor in causing the injuries. *Gideon*, 761 F.2d at 1145.

[63] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, (1993).

records), his experience, and a broad reading of the medical literature.[64]

Petitioners met even the most restrictive burden by establishing with the testimony of Dr. Smith, that exposure to Respondents' mining and milling operations caused the precise injuries asserted. Specifically, Dr. Smith examined the individuals, reviewed medical records, reviewed X-rays, conducted studies on laboratory samples, and studied the relevant scientific literature. Then, based upon that knowledge and experience, he opined as to the causation for Petitioners' specific illnesses. By any definition, the affidavit testimony satisfies the burden for specific causation.

Further, as validated by the cited literature, Dr. Smith testified that the Petitioners were exposed to the minimum dosages for sufficient duration of time, to incur the specific illness contracted. (Appendix, p. A-32).

Time and duration of exposure

The mining and milling operations were conducted in Karnes County and adjoining counties for more than 40 years. Most of the Petitioners lived in these areas for their entire lives, some for the majority of the duration of the mining and milling operations. Many of Petitioners actually worked in the mines and milling operations for 20, 30 or more years, and were continuously and systematically exposed to the compounds and substances utilized and produced in mining and milling operations, all specifically identified. To further quantify exposure in exact minutes, hours, or specific dates would be both

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[64] *Kelley v. American Heyer-Schulte*, 957 F.Supp. 873, 883 (W.D. Tex. 1997) *citing Carroll v. Morgan*, 17 F.3d 787, 789-90 (5th Cir. 1994).

unrealistic and insurmountable. To specify the precise amount of exposure to each particular chemical or substance, or to specify the illnesses from *each* particular chemical or substance separately, is impossible. Not surprisingly, the relevant case law does not require such detail and specification.[65]

Most importantly, Petitioners conclusively established each individual had exposure to sufficient (minimum) dosage required to establish causation for each particular illness. Practically, such a showing has been realized as sufficient in litigation of similar mass toxic tort cases.[66] Because of the mining and milling operations and consequential release of contaminants into the ground, water and environment, Petitioners were exposed for years; essentially continually. Dr. Smith's affidavit conclusively established each individuals' (minimum) exposure to sufficient (minimum) dosage required to establish causation for each particular illness. No more is required.

Onerous district court order

The order issued by the magistrate judge and subsequently affirmed by the district court, was overly burdensome and abusive in requiring Petitioners to essentially establish causation, without the benefit of disclosure or discovery. Specifically, that order required *each* Petitioner to produce *an* affidavit from a "qualified" expert that, as to each Petitioner:

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[65] *Allen v. Pennsylvania Eng. Corp.*, 102 F.3d 194, 199 (5th Cir. 1996).

[66] *Id.*

(1) stated with particularity the dosage of exposure;

(2) provided scientific and medical basis for each opinion regarding illnesses or conditions suffered;

(3) named the specific tests conducted and indicated results of each test;

(4) provided employment information for each Petitioner exposed during employment;

(5) provided residence information;

(6) specified time period (duration) of exposure;

(7) specified specific dosage of exposure; and

(8) specified how certain facilities/operations contributed to each injury.

As previously detailed, calculation of precise dosage and exposures are virtually impossible since most of the Petitioners lived in and around the area for many years. Such explicit quantification of dosage seems almost meaningless, and certainly unnecessarily burdensome.

Certainly, the affidavit provided conclusively established each Petitioners' (minimum) exposure to sufficient (minimum) dosage required to establish causation for each particular illness. No more is required by this Court even under *Daubert*.[67]

Petitioners should never have been required to put on their *entire* case with every comprehensively detailed fact, statement, literature, symptoms, piece of all expert opinions, or account for their whereabouts over forty years on each and every day, but were *only* required to meet a threshold test for the Court to see if a *prima facie* showing of a cause of action could be made. Clearly, even under the onerous requirements of the order, *prima facie* causation was established.

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[67] *Daubert*, 509 U.S. at 579.

CONCLUSION

Federal subject matter jurisdiction does not exist. The Price-Anderson Act does not apply to uranium mining activities, nor any activity that lacks an indemnification agreement with the NRC.

Petitioners far exceeded the requirement "to establish a *prima facie* case of causation," and were not required to put on their *entire* case with every comprehensively detailed fact, statement, literature, symptoms, piece of all expert opinions, or account for their whereabouts over forty years on each and every day. Ostensibly, Petitioners were *only* required to meet a threshold test for the Court to see if a *prima facie* showing of a causation existed. Since that burden, was met, dismissal of Petitioners' claims was manifestly unjust.

WHEREFORE, it respectfully is prayed that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMISON LEGAL CENTER
BRUCE L. JAMISON
T. BRYAN AKIN III

Attorneys of Record for Petitioners

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51073

CRECENSIO ACUNA; LEONARDO ACUNA, Individually and as next friend of Pedro Acuna, Leonardo Acuna, Jr. & Genaro Acuna, Minors; HELEN LEAL ALANIZ, individually and as next friend of Abel Alaniz, Jr., Justin Alaniz & Nicole Alaniz, Minors; CONSUELO R. AGUERO, Individually and as next friend of Mark Anthony Aguero & Anna Marie Aguero, Minors; JOSE LUIS AGUERO, JR., Individually and as next friend of Patrick T. Aguero, a Minor; ET AL

Plaintiffs-Appellants,

v.

BROWN & ROOT INC.; ET AL,

Defendants

BROWN & ROOT INC.; CHEVRON USA INC., Individually, as parent, and successor in interest to Chevron Resources Company, a division of Chevron Industries, Inc.; CONOCO, INC.; CONTINENTAL OIL COMPANY; EXXON CORPORATION; RIO GRANDE RESOURCES CORPORATION; GENERAL ATOMICS, doing business as General Atomics Corp.; ATLANTIC RICHFIELD COMPANY, as successor in interest to Anaconda Company; INTERCONTINENTAL ENERGY CORPORATION, doing business as IEC Corporation

Defendants-Appellees.

* * *

No. 98-51133

REBECCA GARCIA, Individually and as next friend on Stephanie Renee Garcia, a minor; ROGELIO GARCIA; ROMONA GARCIA; SYLVIA M. GARCIA; YOLANDA GARCIA, Individually and as next friend of Roxanne Garcia, Rafael Garcia, Minors, ET AL

Plaintiffs – Appellants

v.

CONOCO INC; ET AL

Defendants

CONOCO INC; CONQUISTA PROJECT CORPORATION; CONTINENTAL OIL CO; CHEVRON CORPORATION; CHEVRON RESOURCES; EXXON CORPORATION; GENERAL ATOMICS, doing business as General Atomics Corp; TOTALE INC; CHEMICAL WASTE MANAGEMENT INC; CHEMICAL WASTE MANAGEMENT OF TEXAS, INC; TOTALE CORPORATION; TOTAL AMERICAN MINING, INC; MALAPAI RESOURCES COMPANY; EVEREST IMINERALS CORPORATION; PIONEER CORPORATION; PIONEER NUCLEAR INC; ATLANTIC RICHFIELD COMPANY; SUSQUEHANNA-WESTERN INC; RIO GRANDE RESOURCES CORPORATION; INTERCONTINENTAL ENERGY CORPORATION; URANIUM RESOURCES INC; GILBERT CONSTRUCTION GOMPANY OF TEXAS, INC; GILBERT CONSTRUCTION COMPANY II; GILBERT CONSTRUCTION COMPANY; OXY MINERALS CORPORATION; MO-VAC INCORPORATED; E G GONZALES TRUCKING & PAVING; BUDDY SMITH DRILLING COMPANY;

GARCIA CONSTRUCTION; BAY INC, doing business as Bay Materials; DAHLSTROM CONSTRUCTION CO; DAHLSTROM INTERNATIONAL INC; DAHLSTROM ENTERPRISES INC; DAHLSTROM HOLDING CORPORATION; DAHLSTROM TRUCKING COMPANY, INC; HAVANNA INC, doing business as Havanna Materials; HELDENFELS BROTHERS INC; INTERNATIONAL ENGINEERING CO; SCOTT DAVIDSON TRUCKING; DAVIDSON CONSTRUCTION & TRUCKING; MARCUS GARCIA; G P MATERIALS INC; MCKENZIE CONTRACTORS INC; MCKENZIE MATERIALS INC; BROWN & ROOT INC; LONE STAR DRILLING COMPANY INC; LONE STAR DRILLING CORPORATION; LONE STAR STATE DRILLING CORPORATION; LONE STAR FOUNDATION DRILLING INC; LONE STAR DRILLING COMPANY; BEACKLEY DRILLING; TEPCORE DRILLING INC; CHEM-WASTE MANAGEMENT; REDGY SUYLLIVANT DRILLING; CENTURY GEOPHYSICAL CORP; CENTURY GEOPHYSICAL MOBILE SERVICE; ANACONDA COMPANY; PAWALEX SUPPLY; DSI; WESTINGHOUSE ELECTRIC CORPORATION; REX LILLY SANDBLASTING; WYOMING MINERSALS; GREYBACK CONSOLIDATED INC; BUCKALOO INC; ANALOG; HERBIE MCNITCH WATERWELL SERVICES; JOHN DOE COMPANIES

Defendants – Appellees

Appeals from the United States District Court
for the Western District of Texas

(Filed Jan. 11, 2000)

Before GARWOOD, SMITH and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:

The above-captioned cases were consolidated on appeal. They present the common issue of whether jurisdiction in the federal courts is appropriate under the Price Anderson Act, 42 U.S.C. § 2210(n) (2), where plaintiffs have alleged tortious injury arising from uranium mining activity. Plaintiffs-appellants also appeal the imposition of certain pre-discovery orders and argue, in the alternative, that they satisfied any burdens placed upon them and that their cases should not have been dismissed. As discussed below, we find that jurisdiction was proper under 42 U.S.C. § 2210(n) (2) and that dismissal of the cases was proper.

I. *Facts and Procedural History*

Crecension Acuna and other plaintiffs, in total numbering over one thousand, brought suit in Texas state court against defendant companies for alleged personal injuries and property damage arising from defendants' uranium mining and processing activities. Rebecca Garcia and approximately 600 other plaintiffs brought suit alleging similar claims against a partially overlapping set of defendants, most of whom were also engaged in uranium mining activities in another area of Texas.

In both cases, plaintiffs alleged that they were exposed to and injured by the defendants' mining and processing activities. Some plaintiffs worked in uranium mines or processing plants, while others alleged exposure to radiation or uranium dust or tailings through contact with family members who worked in the mines or

through environmental factors such as wind and groundwater. Plaintiffs alleged a range of injuries as well as durations and intensities of exposure.[1]

Both suits were filed in Texas courts, alleging causes of action under state law. Defendants removed the cases to the federal district court for the Western District of Texas, where they were treated as related cases. Over plaintiffs' objections, that court asserted jurisdiction under the Price Anderson Act, 42 U.S.C. § 2210(n) (2). First in *Acuna* and then in *Garcia*, the court issued pre-discovery scheduling orders that required plaintiffs to establish certain elements of their claims through expert affidavits. Those affidavits had to specify, for each plaintiff, the injuries or illnesses suffered by the plaintiff that were caused by the alleged uranium exposure, the materials or substances causing the injury and the facility thought to be their source, the dates or circumstances and means of exposure to the injurious materials, and the scientific and medical bases for the expert's opinions.

In response to the order issued in *Acuna*, plaintiffs submitted just over one thousand form affidavits from a single expert, Dr. Smith. Those affidavits identified a series of illnesses and effects that can occur as a result of uranium exposure and stated that the relevant plaintiff suffered from some or all of them. The affidavits stated that Dr. Smith had reviewed the plaintiff's medical data and had come to the conclusion that exposure to uranium and its byproducts had reached clinically significant

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[1] Plaintiffs also originally alleged property damage, but the latter claim appears to have been dropped at the district court and does not form part of this appeal.

doses. The affidavits went on to list all of the mining facilities covered in the lawsuit as responsible for each plaintiff's exposure and routes of exposure as including inhalation, ingestion, and direct skin contact. The affidavits also included a list of scientific studies and materials.

The magistrate judge found that the affidavits did not comply with the scheduling order, reiterated some of the requirements of the order, and gave plaintiffs an additional month to comply. Plaintiffs then submitted additional affidavits by Dr. Smith and two other experts. Some individuals were identified in these affidavits as suffering from particular diseases but the other required information was not provided regarding their claims. The supplemental affidavits did not provide any new information regarding the specific claims of the vast majority of plaintiffs. The magistrate judge found that these additional affidavits still failed to meet the specificity requirements of the order and recommended that the case be dismissed. The district court issued a memorandum and order dismissing the case.

An identical pre-discovery order was issued some months later in *Garcia*. Plaintiffs in that case submitted only one affidavit by Dr. Smith, designed to cover all plaintiffs' claims. Following the magistrate judge's recommendation, the district court dismissed the case for failure to comply with the order. Plaintiffs in both cases appeal.

II. *Analysis*

A. *Federal Jurisdiction*

Plaintiffs in both cases contend that removal was improper under the Price Anderson Act. They argue that neither the statutory language nor Congressional intent confers federal jurisdiction over claims arising from uranium mining and related activities. Defendants counter that the Act was meant to create federal jurisdiction over all claims connected to the nuclear power and weapons industries, including the mining and processing of uranium.

The district court's exercise of jurisdiction is reviewed de novo, *see Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 692 (5th Cir. 1995), and doubts regarding whether removal jurisdiction is proper should be resolved against federal jurisdiction. *See Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988). We find that the Price Anderson Act does confer exclusive federal jurisdiction over the claims in this case.

The Price Anderson Act sets up an indemnification and limitation of liability scheme for public liability arising out of the conduct of the nuclear energy and weapons industries. The jurisdictional provision in question here, 42 U.S.C. § 2210(n) (2), was amended in 1988 to expand jurisdiction. Previously, only those claims arising out of an "extraordinary nuclear occurrence" were subject to automatic federal jurisdiction. The section now reads, in relevant part:

> (2) With respect to any public liability action arising out of or resulting from a *nuclear incident*, the United States district court in the

> district where the incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant . . . any such action pending in any State court . . . shall be removed or transferred to the United States district court having venue under this subsection.

42 U.S.C. § 2210(n) (2). 42 U.S.C. § 2014 defines "nuclear incident" as encompassing any occurrence causing personal or property damage arising out of the toxic, radioactive, explosive, or other hazardous properties of atomic or byproduct materials.

Plaintiffs seek to limit Price Anderson's jurisdictional grant, relying on a lengthy exposition of the history of the Act and an intricate series of interpolations from definitions elsewhere in the legislation. Taken together, their arguments would posit the following: the jurisdictional grant contained in § 2210(n) (2) is meant only to apply to singular, accidental events at a contract location subject to the indemnification portion of the Act that is not located in a state which regulates its own uranium industry pursuant to an agreement with the Nuclear Regulatory Commission [NRC]. Such a tortured interpretation is unnecessary and runs counter to the plain language of the statute as well as the Congressional intent behind the 1988 amendment of § 2210(n) (2).

There is nothing in the definition of "nuclear incident" which suggests it should be contingent on whether the occurrence took place in a state which regulates its own uranium industry under NRC guidelines or whether the facility is covered under the separate indemnification

portions of the Act. "Nuclear incident" is not limited to a single, catastrophic accident: indeed, one purpose behind the 1988 amendments was to expand the scope of federal jurisdiction beyond actions arising from "extraordinary nuclear occurrences" only. *See Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1502 (10th Cir. 1997). Plaintiffs' attempts to reintroduce the limitations of "extraordinary nuclear occurrence" into the 1988 amendments' substitution of "nuclear incident" rely on faulty statutory interpretation and are contrary to Congressional intent. *See Carey v. Kerr-McGee Chem. Corp.*, 60 F.Supp.2d 800, 803-07 (N.D. Ill. 1999) (analyzing history and impact of § 2210(n) (2) and refuting the same arguments made by plaintiffs in the instant case contained in *Gilberg v. Stepan Co.*, 24 F.Supp.2d 325 (D.N.J. 1998)).

Courts that have considered the general question of the scope of jurisdiction under the 1988 amendments have found that Congress intended to create an exclusive federal cause of action for torts arising out of nuclear incidents. *See, e.g., Roberts v. Florida Power & Light Co.*, 146 F.3d 1305 (11th Cir. 1998); *In re Three Mile Island II*, 940 F.2d 832 (3d Cir. 1991).

Uranium extraction and processing are part of the nuclear weapons and power industries, and therefore come within the ambit of § 2210(n) (2). *See Nieman v. NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997) (Act creates federal cause of action for continuing trespass from a uranium processing plant); *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997) (Act would preempt state suit for injuries arising from uranium mining and processing). *Cf. In re Cincinnati Radiation Lit.*, 874 F.Supp. 796, 832 (S.D.

Ohio 1995) (injuries resulting from medical experimentation with radiation not intended to come under § 2210(n)(2)). The district court's exercise of removal jurisdiction under 42 U.S.C. § 2210(n)(2) was proper.

B. *Pre-trial Procedure in the District Court*

Plaintiffs contend that the pre-discovery orders requiring expert support for the details of each plaintiff's claim imposed too high a burden for that stage of litigation. In the alternative, they argue that they in fact complied with the orders and that their cases should be remanded for discovery and trial. The district court's dismissal of plaintiffs' claims in *Garcia* is reviewed for plain error, because plaintiffs did not make a timely objection to the magistrate judge's recommendation of dismissal. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1424 (5th Cir. 1996) (en banc); *see also Crawford v. Falcon Drilling Co., Inc.*, 131 F.3d 1120, 1123-24 (5th Cir. 1997). Plaintiffs did file an objection in *Acuna*, and the district court therefore conducted a de novo review of the recommendation to dismiss. We review the district court's dismissal order under Fed.R.Civ.P. 16(f) for abuse of discretion. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976); *FDIC v. Conner*, 20 F.3d 1376, 1380 (5th Cir. 1994).

The pre-discovery orders in issue are of a type known as *Lone Pine* orders, named for *Lore v. Lone Pine Corp.*, No. L-33606-85 (N.J. Super. Ct. 1986). *Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation. In the federal courts, such orders are

issued under the wide discretion afforded district judges over the management of discovery under Fed.R.Civ.P. 16.

In these two cases, treated as related in the district court, there are approximately one thousand six hundred plaintiffs suing over one hundred defendants for a range of injuries occurring over a span of up to forty years. Neither the defendants nor the court was on notice from plaintiffs' pleadings as to how many instances of which diseases were being claimed as injuries or which facilities were alleged to have caused those injuries. It was within the court's discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require. *See Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 436 (5th Cir. 1990); *Fournier v. Textron, Inc.*, 776 F.2d 532, 534 (5th Cir. 1985) (noting district court's authority to manage and develop complex litigation discovery).

The scheduling orders issued below essentially required that information which plaintiffs should have had before filing their claims pursuant to Fed.R.Civ.P. 11(b)(3). Each plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries. *See Beanal v. Freeport-McMoran, Inc.*, ___ F.3d ___, 1999 WL 1072274 *4 (5th Cir.) (plaintiff's complaint is insufficient where it is devoid of "names, dates, locations, times, or any facts that would put [defendant] on notice as to what conduct supports . . . his claims"). The affidavits supplied by plaintiffs did not provide this information. The district court did not commit clear error or an abuse of discretion

in refusing to allow discovery to proceed without better definition of plaintiffs' claims.

III. *Conclusion*

We find that the Price Anderson Act, 42 U.S.C. § 2210(n) (2), conferred federal jurisdiction over the cases before us and that removal was therefore proper. We also find that the district court's pre-discovery orders and orders of dismissal were not abuses of its discretion. We therefore AFFIRM the judgments of the district court.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-51133

D.C. Docket No. SA-96-CV-1079

REBECCA GARCIA, Individually and as next friend of Stephanie Renee Garcia, a minor; ROGELIO GARCIA; ROMONA GARCIA; SYLVIA M. GARCIA; YOLANDA GARCIA, Individually and a/n/f of Roxanne Garcia, Rafael Garcia, Minors, ET AL

Plaintiffs-Appellants

v.

CONOCO INC; ET AL

Defendants

CONOCO INC; CONQUISTA PROJECT CORPORATION; CONTINENTAL OIL CO; CHEVRON CORPORATION; CHEVRON RESOURCES; EXXON CORPORATION; GENERAL ATOMICS, doing business as General Atomics Corp; TOTALE INC; CHEMICAL WASTE MANAGEMENT INC; CHEMICAL WASTE MANAGEMENT OF TEXAS, INC; TOTALE CORPORATION; TOTAL AMERICAN MINING, INC; MALAPAI RESOURCES COMPANY; EVEREST MINERALS CORPORATION; PIONEER CORPORATION; PIONEER NUCLEAR INC; ATLANTIC RICHFIELD COMPANY; SUSQUEHANNA-WESTERN INC; RIO GRANDE RESOURCES CORPORATION; INTERCONTINENTAL ENERGY CORPORATION; URANIUM RESOURCES INC; GILBERT CONSTRUCTION COMPANY OF TEXAS, INC; GILBERT CONSTRUCTION COMPANY II;

GILBERT CONSTRUCTION COMPANY; OXY MINERALS CORPORATION; MO-VAC INCORPORATED; E G GONZALES TRUCKING & PAVING; BUDDY SMITH DRILLING COMPANY; GARCIA CONSTRUCTION; BAY INC, doing business as Bay Materials; DAHLSTROM CONSTRUCTION CO; DAHLSTROM INTERNATIONAL INC; DAHLSTROM ENTERPRISES, INC.; DAHLSTROM HOLDING CORPORATION; DAHLSTROM TRUCKING COMPANY, INC; HAVANNA INC, doing business as Havanna Materials; HELDENFELS BROTHERS INC; INTERNATIONAL ENGINEERING COMPANY; SCOTT DAVIDSON TRUCKING; DAVIDSON CONSTRUCTION & TRUCKING; MARCOS GARCIA; G P MATERIALS INC; MCKENZIE CONTRACTORS INC; MCKENZIE MATERIALS INC; BROWN & ROOT INC; LONE STAR DRILLING COMPANY INC; LONE STAR DRILLING CORPORATION; LONE STAR STATE DRILLING CORPORATION; LONE STAR FOUNDATION DRILLING INC; LONE STAR DRILLING COMPANY; BEACKLEY DRILLING; TEPCORE DRILLING INC; CHEM-WASTE MANAGEMENT; REDGY SUYLLIVAN DRILLING; CENTURY GEOPHYSICAL CORP; CENTURY GEOPHYSICAL MOBILE SERVICE; ANACONDA COMPANY; PAWALEX SUPPLY; DSI; WESTINGHOUSE ELECTRIC CORPORATION; REX LILLY SANDBLASTING; WYOMING MINERALS; GREYBACK CONSOLIDATED INC; BUCKALOO INC; ANALOG; HERBIE MCNITCH WATERWELL SERVICES; JOHN DOE COMPANIES

Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas, San Antonio.

Before GARWOOD, SMITH, and BENAVIDES, Circuit Judges.

JUDGMENT

(Filed Jan. 11, 2000)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: Feb. 02, 2000

OP-OA-J-1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

REBECCA GARCIA, individually, and as next friend of Stephanie Renee Garcia, et al.,	)	CIVIL ACTION NO. SA-96-CA-1079-OG
Plaintiff(s),	)	
v.	)	(Filed Sep. 30, 1998)
CONOCO, INC., et al.,	)	
Defendant(s).	)	

ORDER ACCEPTING MAGISTRATE JUDGE'S RECOMMENDATION

On this date came on to be considered the Memorandum and Recommendation of the United States Magistrate Judge, filed in the above-styled and numbered cause on May 5, 1998.

According to the records of the Court, Plaintiffs were served with a copy of the Memorandum and Recommendation on or about May 6, 1998. Any party who desires to object to a Magistrate Judge's findings and recommendations must serve and file his written objections within ten days after being served with a copy of the findings and recommendation. 28 U.S.C. § 635(b)(1). No objections to the Memorandum and Recommendation have been filed.

Because no party has objected to the Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo

determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). The Court has reviewed the Memorandum and Recommendation and finds it to be neither clearly erroneous nor contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989). Accordingly,

IT IS ORDERED THAT the Memorandum and Recommendation of the United States Magistrate Judge filed in this cause on May 5, 1998 be and is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) such that Plaintiffs' claims for personal injury are DISMISSED under Rule 16(f) for failure to comply with the scheduling order and their remaining claims for property damage are DISMISSED under Rule 41(b) for failure to prosecute; and

IT IS FURTHER ORDERED THAT all other pending motions are DENIED as moot.

SIGNED and ENTERED this 30 day of September, 1998.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
UNITED STATES
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

REBECCA GARCIA,	§	
INDIVIDUALLY AND AS	§	
NEXT FRIEND OF	§	
STEPHANIE RENEE GARCIA,	§	
A Minor	§	**C.A. M-95-340**
VS.	§	
	§	
CONOCO, INC., ET AL	§	

PLAINTIFFS' MOTION FOR REMAND

(Filed Jan. 10, 1996)

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Plaintiffs, REBECCA GARCIA, Individually and as next friend of STEPHANIE RENEE GARCIA, a minor, et al, and in response to Defendants' latest pleadings for removal file this their Motion for Remand, respectfully showing this Honorable Court as follows:

I.

Defendants improvidently removed this case from the 93rd Judicial District Court of Hidalgo County, Texas, pursuant to 42 U.S.C. §2210(n)(2).

II.

There is no federal subject matter jurisdiction in this case, and the case must be remanded to state court pursuant to 28 U.S.C. §1447(c).

III.

This Court does not have subject matter jurisdiction pursuant to 42 U.S.C. §2210(n)(2), or any other federal law or statute. This is a civil action for damages for personal injuries and property damage to numerous Plaintiffs who are residents and citizens of the State of Texas. Further, since certain Defendants are residents and citizens of Texas, diversity of citizenship does not exist.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that this Honorable Court remand this case to the 93rd Judicial District Court of Hidalgo County, Texas.

Respectfully submitted,

JAMISON LEGAL CENTER

/s/ Bruce L. Jamison
Bruce L. Jamison
TSB# 10561500
1001 Texas Avenue, Suite 405
Houston, Texas 77002
(713) 222-9987 - Office
(713) 224-6604 - Facsimile

CERTIFICATE OF CONFERENCE

I hereby certify that on January 9, 1996, counsel for Defendants, CONOCO, INC., CONTINENTAL OIL COMPANY, EXXON CORPORATION, RIO GRANDE RESOURCES, GENERAL ATOMICS, ATALANTIC [sic] RICHFIELD CORP., CHEVRON CORPORATION and INTERCONTINENTAL ENERGY CORPORATION, was contacted in an attempt to resolve the dispute without the

necessity of court intervention. Counsel for said Defendants objects to Plaintiffs' motion and, therefore, same is tendered to the Court for ruling.

/s/ Bruce L. Jamison
BRUCE L. JAMISON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

REBECCA GARCIA, Individually and as Next Friend of Stephanie Renee Garcia, et al.,	*	
Plaintiffs,	*	**CIVIL NO. SA-96-CA-1079**
v.	*	
CONOCO, INC., et al.,	*	
Defendants.	*	

SCHEDULING ORDER and ORDER CONCERNING CONSENT TRIALS, DISCOVERY, PRETRIAL MATTERS, AND PRETRIAL ORDER

(Filed Jan. 23, 1998)

This is a mass-tort case that is related to another case, *Crecensio Acuna, et al. v. Brown & Root, Inc.*, Civil No. SA-96-CA-543-OG (the "Acuna" case). In that case, the undersigned issued an atypical scheduling order, which was the subject of an appeal to District Judge Orlando L. Garcia, Judge Garcia affirmed the undersigned's order enforcing the atypical scheduling order in the Acuna case. In light of Judge Garcia's order in the Acuna case, the undersigned shall impose a similar scheduling order in this case, along with an order concerning consent trials, discovery, pretrial matters, and pretrial order.

A. SCHEDULING ORDER.

Pursuant to Rule 16, Federal Rules of Civil Procedure, the Court issues the following Scheduling Order:

1. On or before March 23, 1998, plaintiffs shall produce to defendants, for each individual plaintiff, an affidavit from a qualified expert that will:

A. With respect to each plaintiff's claim for personal injuries:

(1) List all injuries, illnesses or conditions suffered by the plaintiff that, in the opinion of the expert, were caused by an alleged exposure to materials or substances from a facility or operation;

(2) Specify the material(s) or substance(s), that, in the opinion of the expert, caused each injury, illness or condition listed and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);

(3) Describe, with specific dates, times, circumstances and incidents and exposure (i.e., ingestion, inhalation, dermal contact, etc.), how the plaintiff was exposed to the material(s) or substance(s) in question, how often, and in what dosages; and

(4) State the scientific and medical bases for the expert's opinions.

B. With respect to each plaintiff's claim for property loss:

(1) List all property that, in the opinion of the expert, was damaged by an alleged exposure to material(s) or substance(s) from a facility or operation;

(2) Regarding property alleged to be damaged, identify all real property by owner, street address, tax block and lot number,

size and a description of improvements thereto;

(3) Identify the material(s) or substance(s) that, in the opinion of the expert, caused each alleged property damage and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);

(4) For all property, report the amount of the alleged loss in value, the timing and degree of the alleged loss, the method of causation and the method of evaluation of such alleged loss in value.

2. *Defendants' Response, and Status Conference.* On or before April 13, 1998, defendants shall file either (1) an advisory with the Court stating that it finds no deficiencies in the affidavits of plaintiffs' experts, or (2) an appropriate motion[1] indicating the deficiencies in the affidavits of plaintiffs' experts. After either an advisory or motion is filed in accordance with this paragraph, the undersigned will set a status conference at which all pending issues or motions shall be addressed and the following requirements and schedule may be reconsidered.

3. *Initial Discovery Phase.* After the status conference, the following schedule shall apply:

A. Defendants may depose plaintiffs' expert witnesses and a representative sampling of plaintiffs as chosen or selected by

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[1] The motion may be a motion to dismiss for failure to comply with the scheduling order, a motion for summary judgment, or other motion that defendants deem appropriate.

defendants. The deadline for conducting such depositions is August 21, 1998.

B. Defendants shall provide plaintiffs with expert reports in response to (1) deposition testimony of plaintiffs and plaintiffs' experts, and (2) plaintiffs' expert reports and affidavits provided to defendants in accordance with the provisions of paragraph 1, which required plaintiffs to provide defendants with expert reports. Defendants shall provide these expert reports by September 21, 1998.

C. Plaintiffs may depose defendants' expert witnesses and no more than two representatives of each defendant as chosen or selected by plaintiffs. The deadline for conducting such depositions is October 21, 1998.

4. *Mediation*. The parties shall engage in a mediation on a date and before a mediator to be selected by the parties from the approved mediator list of the San Antonio Division of the Western District of Texas. If the parties are unable to agree on a mediator by July 21, 1998, the Court will appoint one after notice by the parties that they are unable to agree on a mediator. On or before July 21, 1998, the parties shall file an advisory as to the name of the mediator selected, or state that they have not reached an agreement. In any event, the mediation shall take place on or before November 20, 1998. Within 7 days after the mediation, the parties shall file a joint advisory to inform the Court of the date and outcome of the mediation.

5. *Completion of Pretrial Matters and Discovery.* In the event mediation is unsuccessful, the parties may begin all other discovery steps as allowed by the Federal Rules of Civil Procedure and the Local Rules of the Western District of Texas, as the parties deem appropriate. The parties shall, however, comply with the following requirements and schedule:

A. Within 30 days of mediation, the parties shall file all motions to amend of supplement pleadings or to join additional parties.

B. Within 90 days of mediation, plaintiffs shall designate potential fact witnesses and provide written summaries of their expected testimony.

C. Within 120 days of mediation, plaintiffs shall designate any additional expert witnesses (if any are expected to be used in addition to those identified in accordance with the provision of paragraph 1) and provide written expert reports from each.

D. Within 150 days of mediation, defendants shall designate potential fact witnesses and provide written summaries of their expected testimony.

E. Within 180 days of mediation, defendants shall designate any additional expert witness (if any are expected to be used in addition to those identified under paragraph 3) and provide written expert reports from each.

F. Within 240 days of mediation, the parties shall complete all discovery.

G. Within 270 days of mediation, all dispositive motions shall be filed.

H. Within 300 days of mediation, the parties shall file a joint pretrial order in the form required by the Court.

6. *Trial.* The case will be set by the Court for jury trial to begin on a date 30 days or later after the joint pretrial order is due to be filed.

7. *Other Pretrial Matters.* All other pretrial matters shall be governed by the Court's Order Concerning Consent Trials, Discovery, Pretrial Matters and Pretrial Order.

B. ORDER CONCERNING CONSENT TRIALS. DISCOVERY. PRETRIAL MATTERS. AND PRETRIAL ORDER.

1. The ultimate responsibility for submitting the joint proposed pretrial order rests with plaintiff. Unless plaintiff has made a motion to compel or a motion for extension of time *before* expiration of the scheduling deadline, non-cooperation by defendant shall not excuse plaintiff of this scheduling responsibility.

The proposed order shall supply information as required by the enclosed modified form titled "Agreed Pretrial Order," which this Court has adopted as a substitute to the form set forth in Local Rule, Appendix B, Form PT-1. The Court may impose sanctions under Federal Rules of Civil Procedure 16(f) and/or 41(b), if counsel do not timely submit their agreed pretrial order consistent with the enclosed pretrial order form.

2. Pursuant to 28 U.S.C. 636(c)(1), all full-time Magistrate Judges are authorized and empowered to try any civil case, jury or non-jury, with the consent of all parties to the lawsuit. Because of the crowded condition of the criminal docket in this District and the difficulty in reaching civil cases for trial, you may wish to consent to the trial of your case by a United States Magistrate Judge.

If you wish to consent to trial before a Magistrate Judge, you may indicate your consent on the attached forms. Your consent to trial by a Magistrate Judge must be voluntary, and you are free to withhold consent without suffering any adverse consequences. If all parties consent to trial of this case by a Magistrate Judge, the Court will enter an order referring the case by random assignment to a Magistrate Judge for trial and for entry of judgment. If the case has already been referred to a Magistrate Judge for pretrial matters and the parties consent to Magistrate Judge trial, the trial will be before the Magistrate Judge already assigned to the case. Parties must file with the Clerk's Office the "joint consent" form or "non-consent" form within the time prescribed in the Court's scheduling order.

3. Requests for extension of Scheduling Order deadlines must be filed before expiration of the particular deadline. *See* FED. R. CIV. P. 6(b). The Court will be strongly disinclined to grant any extensions of time and expects all such motions, even joint motions, to set forth a showing of good cause. *See* FED. R. CIV. P. 16(b). If the parties file a motion for extension of time, they should be aware that the mere filing of the motion does not stay the applicable deadline and that the Court may impose sanctions pursuant to Rule 16(f) despite the timely filing of a

Rule 6 motion. If a motion for extension of time is joint or unopposed, a statement to this effect should be contained in the **caption and** in the body of the motion. A proposed order with the requested deadlines already added shall be attached to all motions for extensions of time. Failure to attach the proposed order in proper form may result in summary denial of the motion. The parties may agree to extend the deadline for responding to written discovery without Court intervention, unless the agreed extension will affect a Court ordered scheduling deadline.

4. These deadlines shall not relieve the parties from full compliance with any deadlines or scheduled proceedings for arbitration or alternative dispute resolution pursuant to Local Rule CV-87 or CV-88. Similarly, submission of the case to arbitration or alternative dispute resolution **DOES NOT STAY ANY OF THESE DEADLINES.**

5. Except as provided in the Scheduling Order, discovery shall comply with the Federal Rules of Civil Procedure, and Local Rules CV-5 and CV-26 through CV-37.

6. All Rule 26(c) and 37 motions shall be submitted with copies of the challenged discovery.

7. No motions relating to discovery, including Rule 26(c), 29, or 37 motions, shall be filed after the expiration of the discovery period unless they are filed within five business days after the discovery deadline and they pertain to conduct occurring during the final seven calendar days of discovery. Any other discovery-related motions filed after the discovery deadline will not be entertained. Written discovery must be served to allow the responding party at least thirty days (thirty-three days if served by mail) to respond before the close of discovery. The

responding party does not have any obligation to respond to written discovery if the response to the requested discovery would be due after the close of discovery. The responding party does not waive objections if it does not respond. Depositions must be completed before the discovery deadline, and notices setting depositions after the discovery deadline will not be enforced.

8. **ALL** pretrial motions shall contain within the body of the motion a certificate by the movant that counsel for the parties have first conferred in a good-faith attempt to resolve the matter by agreement before filing the motion. *See e.g.*, Local Rule CV-7(I); CV-37(b). In addition, any motions requesting sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure must contain a similar certificate by the movant. *See generally, Thomas v. Capital Security Services, Inc.*, 836 F.2d 866 (5th Cir. 1988). **Failure to provide a certificate of conference within the body of such motions may result in summary denial of the motion and sanctions.** If a motion is joint or unopposed, a statement to this effect shall be contained in the caption as well as the body of the motion.

9. Unopposed discovery may continue after the deadline for discovery so long as it does not delay other pretrial preparations.

10. The moving party shall attach to any motion for summary judgment or motion for partial summary judgment a separate, short, and concise statement of the material facts that, according to the moving party, contain no genuine issue to be tried. The statement shall include

specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits that support the party's contentions.

The party opposing a motion for summary judgment or for partial summary judgment shall attach a separate, short, and concise statement of the material facts that, according to the opposing party, contain genuine issues to be tried. The statement shall include specific reference to those parts of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits that support the party's contentions.

All material facts set forth in the statement required to be served by the moving party may be deemed admitted unless controverted by the statement required to be served by the opposing party.

Failure to comply with this rule by the moving party may result in denial of the motion.

11. Absent prior permission of the Court, no party shall file any motion, response, or reply, including supporting legal authorities, in excess of 20 pages in length. Supporting evidentiary attachments are not included in the page limit. **Responses to motions must be filed no later than fourteen calendar days after the date the motion is filed.** Replies to responses must be filed no later than fourteen calendar days after the date the response is filed; however, the Court may rule on a motion without awaiting a reply. If a motion or response is served by mail, three additional days **will not** be added to these time frames. Normal filing and service requirements apply to letter briefs. The Court may shorten the time for a response or reply.

12. All filings must be signed by a party or his attorney, and the name, address, telephone number, and facsimile number of the signer must be typed or printed under the signature, and must indicate which party the signatory represents (e.g., "Jane Doe, attorney for defendant, Acme, Inc."). The State Bar card number of each signing attorney shall also be included. A filing may be signed with permission by another attorney admitted to the Western District of Texas.

13. Failure of a *pro se* party or an attorney for a represented party to keep the Court advised at all times of its correct address may subject that party or its attorney to appropriate sanctions.

14. Any requirement of this order or the attached "Agreed Pretrial Order" form may be waived by the Court when it is in the interest of justice.

15. **All pleadings and papers in a case shall be filed with the District Clerk.** The Court will not accept courtesy copies. Service on other parties must be by hand delivery, United States mail, or express delivery; service by facsimile is not permitted and does not constitute service.

It is so **ORDERED.**

SIGNED this 22nd day of January, 1998.

/s/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate
Judge

STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared C.F. Smith, who, being by me first duly sworn, did depose and state as follows:

1. "My name is C.f. Smith, M.D., and I am a degreed medical doctor licensed to practice medicine in the State of Tennessee. I am fully competent to make this affidavit. All facts contained in this affidavit are within my personal knowledge and are true and correct.

2. "This affidavit was prepared following review of diagnostic radiography, laboratory studies and intake occupational, social and medical histories of individuals who worked and resided in the area.

3. "Based upon the aforementioned, and to a reasonable degree of medical certainty, it is my professional opinion, that the individuals listed in Appendix A to this affidavit, sustained injuries from exposure to hazardous chemicals and/or radioactive materials resulting from mining and processing of uranium, and substances related to mining activities directly and/or by in-utero exposure of the mother and father.

4. "To reasonable medical probability and scientific certainty, such exposure was to clinically significant doses of hazardous toxic substances sufficient to cause such varied

conditions as kidney disease, arthritis, porphyria, pneumoconiosis and other types of pulmonary problems.

5. "More specifically, it is my professional medical opinion based upon a reasonable degree of medical certainty, that these individual [sic] currently suffer from or based upon reasonable medical certainty will in the future suffer from some or all of the following injuries and impairments to health, which were caused by exposure to chemicals, compounds and by-products of uranium mining and milling operations in Karnes County, Texas and surrounding areas, detailed herein.

Pulmonary pathology
Kidney pathology
Dysfunctional cellular immune response
Dysfunctional humoral immune response
Hepatic enzymes
Integumentary pathology
Musculoskeletal pathology.

Pneumoconiosis
Pre-pneumoconiosis
Abnormalities suspective for malignancy
Abnormal porphyrin levels
Abnormal creatinine clearance

6. "To a reasonable degree of medical certainty, the injuries detailed above are caused from exposure to toxins, which were distributed in and around the area via air, groundwater, as well as, other means

and methods of transfer and transport from the uranium milling processes of hazardous substances and their by-products across the geographical location of the individuals' presence or residence.

7. "This exposure was on a continual basis to the foregoing, which were by-products of and/or utilized in uranium mining/milling efforts in Karnes County, Texas and surrounding areas, and resulted from, among other avenues, inhalation, ingestion of contaminated water and dust and skin contact.

8. "The particular facilities and operations where these toxins were produced or utilized include:

Panna Maria Project and associated activities;
Conquista Project and associated activities;
Hobson Project and associated activities;
Rhode Ranch Project and associated activities;
Palangana Project and associated activities;
Susquehana Project and associated activities;
Ray Point Project and associated activities;
George West Project and associated activities;
Lamprecht Project and associated activities;
Zamzow Project and associated activities; and/or

Pawnee Project and associated activities.

These facilities/operations were either owned, operated or controlled or engaged in hazardous operations by entities listed in Appendix B attached hereto:

9. "This exposure to and/or contact with materials and substances including Uranium and its by-products, was generated as a result of mining and milling activities and other chemicals and substances associated in these processes and transport including:

Uranium and its by-products, including but not limited to:
Radon
The radioactive isotope daughters of Radon

Strong acids including but not limited to:
Sulfuric
Phosphoric
Hydrochloric

Strong bases, including but not limited to Ammonia Heavy metals, including but not limited to Copper Sulfate

Solvents including but not limited to:
Benzene
Carbon Tetrachloride
2-Ethylhexanol
Kerosene

10. "The routes of exposure occurred on a daily basis via inhalation, ingestion

through water and food, and direct skin contact including toxic substances embedded in clothing. Chronic low doses and, at times, acute high doses at toxic levels were experienced.

11. "The foregoing opinions specifically and directly rely upon and are supported by the following scientific literature:

Tarasenko, N. Ju. (1992). *Uranium, alloys and compounds.* In, Luigi Parmeggiani, (Ed.), **Encyclopedia of Occupational Health and Safety,** 3rd edition. Geneva: International Labour Office, Pp. 2237-2239.

Sheppard, D. (1992). *Occupational pulmonary disorders.* In, J.B. Wyngaarden, L.H. Smith, and J.D. Bennett (Eds.), **Cecil Textbook of Medicine.** Philadelphia: W.B. Saunders. Pp. 2333-2340.

Levine R. Williams, J., Stadtman, E., and Shacter, E. 1994). *Carbonyl assays for determination of oxidatively modified proteins.* **Methods in Enzymology.** 233:346-357.

Debets, F., Reinders, J-H., Koss, G., Seidel, J., and Strik, A. (1981). **Chem.-Biol. Interact.** 37:77-94.

Ferioli A., Harvey, C.A., and De Matteis, F. (1984). **Biochem. J.** 224:769-777.

Koss, G., Seubert, S., Seubert, A., Herbert, M., Koransky, W. and Ippen, H,. (1980). In, B. Holmstedt, R. Lauwerys, M. Mercier, and M. Roberfroid, (Eds.), **Mechanisms of Toxicity and Hazard Evaluation.** Pp. 517-520. New York: Elsevier Biomedical Press.

Silbergeld, E.K. (1987). *Porphyrins as indicators of chemical injury and exposure.* **Ann. N.Y. Acad. Sci.** 514:170-171.

Doss, M.O. (1987). *Porphyrinurias and occupational disease.* **Ann. N.Y. Acad. Sci.** 514:204-218.

Fowler, B.A., Lucier, G.W., and Hayes, A.W. (1982). *Organelles as tools in toxicology.* In, A.W. Hayes, (Ed), **Methods in Toxicology.** Pp. 635-658. New York City: Raven Press.

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12. "These opinions have been verified by the scientific method and also considered the potential rate of error for laboratory analysis and radiographic examination.

13. "Additionally, the supporting literature has been cited from peer-reviewed medical and scientific journals.

14. "The foregoing opinions are consistent with the generally accepted methods and procedures for gathering the medical data utilized and are the generally accepted methods used in the practice of medicine and medical research."

FURTHER, AFFIANT SAYETH NOT.

/s/ C.F. Smith
C.F. Smith, M.D.

SWORN TO AND SUBSCRIBED before me on this 24th day of August, 1997, to certify which witness my hand and official seal of office.

/s/ Ellen Loomstein
Notary Public in and for
the State of Texas

[SEAL]

ELLEN LOOMSTEIN
Notary Public State of Texas
My Commission Expires
NOV. 8, 1997

PLAINTIFFS' EXHIBIT "A"

Aguero, Jose Luis

Aguirre, Adolfo

Alaniz, Alonzo

Alaniz, Domingo, Individually, and a/n/f of Saragosa Mario Alaniz, Roland Thomas Alaniz, Alejandro Javier Alaniz, minors

Alaniz, Gloria, Individually, and a/n/f of Santiago Turrubiartes Alaniz, minor

Alaniz, Irma, Individually, and a/n/f of Martin Alaniz Jr., minor

Alaniz, Maria R.

Alaniz, Reyes, Individually, and on behalf of the Estate of Alfredo Alaniz, Deceased

Alaniz, San Juanita Garcia, Individually, and a/n/f of Roxanne Alaniz, Jason M. Rodriquez, minors

Alaniz, Santiago Rivas Jr.

Alaniz, Santiago Sr.

Alvarez, Margarito

Alvarez, Adelfa

Alvarez, Alfredo J.

Alvarez, Deanna Morin

Amador, Alfred, Individually, and a/n/f of Anthony Amador, Anna Amador, Alvin Amador, Audrey Amador, Albert Amador, Angititan Amador, Aurora Amador, minors

Aquirre, Minerva Rivas

Barnes, Ruby, Individually, and on behalf of the Estate of Floyd Barnes, Sr. Deceased

Belcher, Ronald

Belcher, Stella

Benavides, Lionel E., Individually, and a/n/f of Katherina Lee Benavides, Karla Elizabeth Benavides, Mary Vanessa Benavides, minors

Butler, Lonnie Lee

Butler, Nora, Individual, and a/n/f of Bronchelle Butler, Casandra Butler, Calandra Butler, Bronston Butler, Bruchelle Shelton, Brushane Shelton, minors

Caiati, Vincent, Individually, and a/n/f of Colton Clay Caiati, minor Camacho, Maragret [sic], Individually, and a/n/f of Linda Michelle Camacho, minor

Camacho, Marcelo Jr.

Campbell, Paul

Canales, Maria Minerva

Cano, Joe

Casarez, Ignasio

Caspillo, Guadalupe

Castillo, Jesse, Individually, and a/n/f of Jessica Castillo, Jessee Joe Castillo, James Robert Castillo, minors

Castillo, Maria Magdelena

Chapa, Anna Huizar, Individually, and a/n/f of Wilfred Chapa, Regina Chapa, minors

Chapa, Jose Molina

Chapa, Monica

Cisneros-Moreno, Andrea, Individually, and on behalf of the Estate of Thomas Cisneros, Jr., Deceased

Cisneros, Elva

Cisneros, Manuel

Cisneros, Robert

Cisneros, Tomas

Crum, Donna

Cruz, Crespin Perez

Cruz, Felipe

Cruz, Gumecindo Jr., Individually, and a/n/f of Micaela Cruz, minor

Cruz, Joe

Cruz, Julia Caballero

Cruz, Pablo Sr.

Cruz, Rodolfo Sr., Individually, and a/n/f of Rudy Cruz Jr., Simon Scott, Pamela Ann Cruz, Christi Ann Cruz, minors

Cuevas, Lupe, Individually, and a/n/f of Lupe Cuevas Jr., Vicky Cuevas, minors

Curtis, Chris, Individually, and a/n/f of Chris Curtis Jr., Mistie Curtis, minors

Curtis, Laurie

DeLuna, Anita, Individually, and a/n/f of Nadia DeLuna, Ernesto DeLuna, Joshua DeLuna, minors

DeLuna, Eberardo, Individually, and a/n/f of Steven DeLuna, Heather DeLuna, minors

DeLuna, Ernesto

Diaz, Liandro, Individually, and a/n/f of Dominique Diaz, Victoria Diaz, Yvonne Diaz, Liandro Daniel Diaz, Larissa Crystal Diaz, minors

Dueñes, Agapito Lopez

Dueñes, Alfredo Lopez

Dueñes, Carolyn, Individually, and a/n/f of Jerry Duenes, Rickie Duenes, Alfredo Duenes Jr., Felicia Duenes, minors

Dueñes, Mary Jane

Elizondo, Eliosa Garza

Elizondo, Robert

Elizondo, Rose Marie

Esparza, Anita V., Individually, and on behalf of the Estate of Juan Esparza, Deceased

Esparza, Tania

Esterada, Israeal Z.

Esterada, Matilda

Estrada, Albert, Individually, and a/n/f of Chris Estrada, minor

Foley, Carl L., Individually, and a/n/f of Tammie Foley, Tommie Foley, Carl Foley Jr., minors

Foley, Charles

Foley, Patricia Ann

Fuentes, Norma, Individually, and a/n/f of Cristina Fuentes, Brittany Fuentes, Simon Fuentes III, minors

Fuentes, Pabalo G. Sr.

Garcia, Antonia

Garcia, Bruno, Individually, and a/n/f of Marcus Garcia, Christina Garcia, Amelia Garcia, minors

Garcia, Fidel

Garcia, George

Garcia, Raul, Individually, and a/n/f of Raul Garcia Jr., minor

Garcia, Refugia, Individually, and a/n/f of Raul Garcia Jr., minor

Garcia, Rogelio

Garcia, Yolanda, Individually, and a/n/f of Roxanne Garcia, Rafaela Garcia, minors

Garza, Catarina S., Individually, and on behalf of the Estate of Cipriano P. Garcia, Deceased

Garza, Delia Lynn

Garza, Delia

Garza, Elijio

Garza, Estella, Individually, and a/n/f of Aimee Nicole Garza, Aric Noel Garza, minors

Garza, Ralph, Individually, and a/n/f of Ralph Garza, Stephanie Garza, minors

Garza, Vidal, Individually, and a/n/f of J.R. Garza, Maggie Garza, minors

Gomez, Sylvia

Gonzales, Ida Marie

Gonzales, Manuel Jr., Individually, and a/n/f of Manuel Anthony, Terry Sanchez, minors

Gonzales, Ofilia Vasquez

Gonzales, Robert, Individually, and a/n/f of Jamie Gonzales, Bobbie Gonzales, Briana Gonzales, minors

Gonzales, Terry Ann

Gonzales, Valente Jr., Individually, and a/n/f of Leslie Ann Gonzales, Valerie Ann Gonzales, minors

Gonzales, Valente Sr.

Gozales, Jimmy

Green, Albert

Guana, Raymond Jr.

Harrison, Donald L. Sr.

Hernandez, Brenda R.

Hernandez, Juan Rodriquez

Hernandez, Rachel Ramirez

Herrera, Mary Jane, Individually, and a/n/f of Justin Matthews Garcia, minor

Herrera, Rosita E., Individually, and a/n/f of Mary Jane Herrera, Michelle Herrera, Mark Anthony Herrera, minors

Herrera, Victor (Tiny) Jr.

Herrera, Victor III

Highberg, Irene

Hinojosa, Ramon, Individually, and a/n/f of Courtney Hinojosa, Shaina Hinojosa, minors

Hoffmeyer, John

Huegler, Ross Clayton Jr.

Infante, Mary Cruz, Individually, and a/n/f of J.D. Cruz, Lizzate Infante, Marisa Infante, minors

Johnson, Charlene, Individually, and a/n/f of Tiffany Renee Brown, minor

Johnson, Eugene Talbert, Individually, and a/n/f of Errol Johnson, minor

Johnson, Randell B.

Jones, Angie, Individually, and a/n/f of Rene Jones Jr., minor

Kotzur, Larry C.

Leal, Gilbert Martinez

Leal, Jose Jr.

Leal, Noe, Individually, and a/n/f of Johnathan Noe Leal, Noe Andrew Leal, minors

Leal, Ruben

Leal, Sylvia, Individually, and a/n/f of Stacey, Kristi, David, minors

Longoria, Maide, Individually, and a/n/f of Vanessa Marie Rodriquez, Valarie Guerrero, minors

Lopez, Antonio

Lopez, Diana M.

Lopez, Tony

Madrigal, Libario Villa P.

Martinez, Lydia B.

Martinez, Rosando

Medina, Juan, Individually, and a/n/f of Juan Medina Jr., Julio Medina Jr., Jeremiah Medina, minors

Medina, Juan

Morales, Gregorio Jr., Individually, and a/n/f of Jacqueline Morales, minor

Morales, Margie S.

Morin, Earl Anthony, Individually, and a/n/f of Brianna L. Morin, minor

Morin, Eustorgio (George)

Morin, Eustorjo Jr.

Morin, Lucia Garza

Morin, Lucy

Morin, Marciano, Individually, and a/n/f of Geraldine, Aaron, minors

Morin, Ninfa

Morin, Ramon

Morin, Sherry

Oakes, Darleen

Ocha, Mike

Ochoa, Dora, Individually, and a/n/f of Amanda Marie Ochoa, minor

Olvera, Arturo, Individually, and a/n/f of Victoria Olvera, minor

Olvera, Mario Gamboa

Orcha, Francisco

Ozuna, Desiderio L.

Pardon, Felix III

Pharr, Christopher V.

Ramirez, Mario

Rebogio, Maria

Rebugio, Vincente

Reteloff, Elizabeth M., Individually, and on behalf of the Estate of Richard C. Reteloff, Deceased

Retzloff, Steven E.

Reyna, Elisa

Reyna, Oscar, Individually, and a/n/f of Tammy Betaneud, Bengina Betaneud, Oscar Reyna Jr., Jeanette Reyna, minors

Reyna, Pedro Serbatez Sr.

Rodriquez, Domingo

Rodriquez, Doris

Rodriquez, Elizabeth, Individually, and a/n/f of Amanda Lee Rodriquez, Victoria Beth Rodriquez, John Phillip Rodriquez, Vanessa Nicole Rodriquez, minors

Rodriquez, Gilbert

Rodriquez, Joe

Rodriquez, Juan

Rodriquez, Richard Lee, Individually, and a/n/f of Nichlas Rodriquez, Brandon Rodriquez, minors

Rodriquez, Saul S.

Rojas, Hilario

Rutab, Hardie Sr.

Rutab, Velma, Individually, and a/n/f of Hardie Rutab Jr., Mark Rutab, minors

Saenz, Dora, Individually, and a/n/f of Rose Marie Saenz, minor

Saenz, Edward

Saenz, Henry, Individually, and a/n/f of Cynthia Ann Esquiers, Henry Saenz II, minors

Saenz, John Jr.

Saenz, Lorenzo III

Saenz, Pauline, Individually, and a/n/f of Lorenzo Lonnie Saenz, DanDee Denise Scott, minors

Saenz, Rachael, Individually, and a/n/f of Edward Saenz Jr., John Andrew Saenz, Chance Cody Saenz, minors

Saenz, Rachael

Salinas, Baldomero, Individually, and a/n/f of Bodie, J.J., minors

Salinas, Benito Sr.

Salinas, Bennie A. Jr.

Salinas, Mary

Sanchez, Sisto

Sandoval, Armando

Sandoval, Diana, Individually, and a/n/f of Stephanie Sandoval, Selena Sandoval, Esteban Sandoval, minors

Sandoval, Michael Andrew

Sandoval, Socorro

Sauceda, Encarnacion Sr.

Sauceda, Ernesto

Shular, Clarice

Shular, Cleo B.

Shular, Elroy

Silva, Fred

Silva, Josephine A., Individually, and a/n/f of Caroline Elaine Silva, Dorthy Ann Silva, Christy Alexandra Silva, minors

Smith, Charles

Smith, Edna

Smith, Kevin, Individually, and a/n/f of Ashley Nicole Smith, minor

Smith, Robert Charles

Smith, Roy

Solis-Cruz, Rachel

Solis, Cynthia, Individually, and a/n/f of Patricia Solis, Christy Solis, minors

Solis, Santiago Jr.

Solis, Yolanda

Sosa, Demetro

Stubbins, Chris J., Individually, and a/n/f of Magdelene Stubbins, Cameron Stubbins, minors

Suceda, Angie, Individually, and on behalf of the Estate of Raymond Suceda, Deceased

Torres, Felicita

Torres, Maurio Sr.

Valdez, Martina Gonzales

Vasquez, Rene

Vasquez, Reynaldo

Vasquez, Ruben

Velasquez, Guadalupe

Velasquez, Raul G.

Villanueva, Irma

Villanueva, Majin

Villareal, Arturo

Villarreal, Ramiro Cantu

Villarreal, Ricardo S.

West, Cora Anne

West, Wayne Neil, Individually, and a/n/f of Shay Ann West, minor

Ybarra, Claro Carreon Jr.

Ybarra, Magdalenda M., Individually, and a/n/f of Esther G. Ybarra, Evelyn G. Ybarra, Daniel I. Ybarra, minors

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

REBECCA GARCIA, Individually and as Next Friend of Stephanie Renee Garcia, et al.,	*	**CIVIL NO. SA-96-CA-1079-OG**
Plaintiffs,	*	
v.	*	
CONOCO, INC., et al.,	*	
Defendants.	*	

MEMORANDUM AND RECOMMENDATION

(Filed May 5, 1998)

This a mass-tort case involving approximately 400 plaintiffs, and it is related to another case, *Crecensio Acuna, et al. v. Brown & Root, Inc.*, Civil No. SA-96-CA-543-OG (the "*Acuna*" case), which involves approximately 1100 plaintiffs. The undersigned issued an atypical scheduling order in this case after Judge Orlando L. Garcia affirmed the undersigned's order in the *Acuna* case that enforced a similar scheduling order in the *Acuna* case. The scheduling order at issue required plaintiffs to show, by affidavits from experts, a prima facie case of causation for specific injuries that plaintiffs allegedly suffered. Before the Court is defendants' joint motion to dismiss this case for failure to comply with the scheduling order. Docket no. 24. Defendants argue for dismissal because plaintiffs together only supplied a single affidavit in their attempt to make an individualized showing

of causation. Upon consideration, the undersigned will recommend that the motion to dismiss should be granted.

Background

The plaintiffs in this case and the *Acuna* case each assert claims for personal injuries and property damages. In each case, plaintiffs allege that their injuries and damages were caused by the defendants' uranium mining and milling operations in a very large multi-county area. The undersigned issued an order enforcing an atypical scheduling order in the *Acuna* case requiring plaintiffs to provide affidavits establishing causation for each plaintiff's personal injuries and property damages. Plaintiffs in the *Acuna* case appealed that order to Judge Orlando L. Garcia, who affirmed the order enforcing the atypical scheduling order. In light of the affirmance by Judge Garcia, the undersigned issued in this case an atypical scheduling order that is nearly identical to the scheduling order in the *Acuna* case. Docket no. 19.

In regard to each plaintiff's claim for personal injuries, the scheduling order in this case required plaintiffs to produce affidavits from qualified experts that:

> (1) List all injuries, illnesses or conditions suffered by the plaintiff that, in the opinion of the expert, were caused by an alleged exposure to materials or substances from a facility or operation;
>
> (2) Specify the material(s) or substance(s), that, in the opinion of the expert, caused each injury, illness or condition listed and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);

(3) Describe, with specific dates, times, circumstances and incidents and exposure (i.e., ingestion, inhalation, dermal contact, etc.), how the plaintiff was exposed to the material(s) or substance(s) in question, how often, and in what dosages; and

(4) State the scientific and medical bases for the expert's opinions.

In regard to each plaintiff's claim for property damages, plaintiffs were required to:

(1) List all property that, in the opinion of the expert, was damaged by an alleged exposure to material(s) or substance(s) from a facility or operation;

(20 Regarding property alleged to be damaged, identify all real property by owner, street address, tax block and lot number, size and a description of improvements thereto;

(3) Identify the material(s) or substance(s) that, in the opinion of the expert, caused each alleged property damage and identify the particular facility or operation alleged to be the source of the material(s) or substance(s);

(4) For all property, report the amount of the alleged loss in value, the timing and degree of the alleged loss, the method of causation and the method of evaluation of such alleged loss in value.

The scheduling order set a deadline for plaintiffs' submission of affidavits to defendants, and provided that defendants could file a motion objecting to the deficiencies in plaintiffs' submissions. In response to the plaintiffs' attempt to comply with the scheduling order, defendants

filed a joint motion to dismiss for failure to comply with the scheduling order. The motion asserts that plaintiffs only submitted a single affidavit and it only addresses plaintiffs' personal injuries. The court must determine whether plaintiffs' latest submission complies with the scheduling order, and whether dismissal is appropriate if plaintiffs have not compiled with the order.

Discussion

1. Plaintiffs' Affidavit

In response to the scheduling order, plaintiffs submitted to defendants a sworn affidavit by C. F. Smith, M.D. ***Mot. Dismiss,*** Exh. A. Dr. Smith's affidavit is nearly identical to his affidavits that were initially submitted by plaintiffs in the *Acuna* case in their attempt to comply with the scheduling order in that case. The submission of those affidavits resulted in the issuance of the order enforcing the scheduling order in the *Acuna* case. Since Dr. Smith's affidavit is nearly identical to the affidavits in the *Acuna* case, it is deficient for the same reasons.

2. Requirement 1 – Identification Of Each Plaintiff's Injuries.

Plaintiffs were required to provide to defendants an affidavit of an expert identifying the specific injuries, illnesses or conditions suffered by each plaintiff. Together with that information, plaintiffs were required to provide an affidavit that provided the scientific and medical bases for each opinion, identify tests done on each plaintiff and indicate the results of the tests. Despite that, Dr. Smith's

affidavit states that the plaintiffs' exposure to toxic substances was sufficient to cause a variety of conditions, and caused *some or all* of a list of injuries. ***Mot. Dismiss,*** Exh. A, par. 5. Also, the opinions in the affidavit are made applicable to *all individuals listed in Appendix A to the affidavit*. ***Mot. Dismiss,*** Exh. A, par. 3. Therefore, Dr. Smith's affidavit is deficient because it does not comply with the requirement to "list injuries, illnesses or conditions suffered" as to each plaintiff.

3. Requirement 2 – Identification Of Injury-Causing Substances.

The scheduling order also required plaintiffs to provide expert affidavits that specify any materials or substances that, in the opinion of the expert, caused each injury, illness or condition suffered by each plaintiff. As to this requirement, the scheduling order also required that the affidavits identify the particular facility or operation alleged to be the source of the materials or substances.

Dr. Smith's affidavit identifies the materials used or allegedly released from uranium mining and milling operations. ***Mot. Dismiss,*** Exh. A, par. 9. The affidavit also provides an opinion that plaintiffs' personal injuries were caused by the exposure to those materials. ***Mot. Dismiss,*** Exh. A, paragraphs 3-7. Dr. Smith's affidavit does not identify the injuries of each plaintiff, so it is inconceivable how Dr. Smith's general statements regarding causation can satisfy the requirement to identify the

specific materials or substances that caused each individual injury. Also, no attempt is made in Dr. Smith's affidavit to comply with that part of the second requirement that requires an expert to identify the particular facility or operation alleged to be the source of the materials or substances that caused the alleged injuries. Dr. Smith only lists the various facilities operated by the defendants. That listing of facilities is meaningless because (1) it is alleged that these facilities were operated in a large multi-county area, and (2) no effort has been made to correlate any geographic group or grouping of plaintiffs to certain uranium mining or milling operations of the defendants. Therefore, the undersigned finds that Dr. Smith's affidavit does not comply with Requirement 2.

4. Requirement 3 – Frequency, Method and Dosage Of Exposures.

The scheduling order required affidavits from experts showing the frequency, method and dosage of each plaintiff's exposure to materials or substances that caused their specific injuries. Dr. Smith's affidavit provided an opinion as to the pathways of the plaintiffs' purported exposures. ***Mot. Dismiss***, Exh. A, paragraphs 6, 7, 10. The Court finds that Dr. Smith's opinion is conclusory and speculative as it does not provide the scientific basis for his opinion. Dr. Smith's opinion is also outside of his area of expertise. Dr. Smith is not a hydrogeologist, microbiologist, toxicologist or expert whose opinion could be used to establish whether a certain dosage, method and frequency of contact is sufficient to cause certain injuries. Thus, Dr. Smith's opinions should

have been limited to conclusions regarding the current medical conditions of plaintiffs and the causes of plaintiffs' conditions based on reasonable *medical* probability. Therefore, the undersigned finds that Dr. Smith's affidavit does not comply with Requirement 3.

5. Property Damage Claims.

In regard to property damages, no affidavits were submitted to show the type of damages or the causation of such damages. In the *Acuna* case, plaintiffs were advised that the failure to provide affidavits regarding property damage claims would be considered waiver of such claims. As plaintiffs in this case are represented by the same counsel as plaintiffs in the *Acuna* case, the Court concludes that the property damage claims were waived by plaintiffs.

6. Authority For Dismissal.

As a result of plaintiffs failure to comply with the Court's scheduling order, the focus turns to defendants' request for dismissal. Rule 16(f) provides that if a party fails to obey a scheduling order, the Court "may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D)." Fed.R.Civ.P. 16(f) (1998). Rule 37(b)(2)(C) provides authority for the Court to dismiss this case as a sanction for plaintiffs' failure to comply with the scheduling order. The Court may not, however, impose the extreme sanction of dismissal under Rule 16(f) unless the Court first finds that a lesser sanction would not serve the interests

of justice. ***Bann v. Ingram Micro, Inc.,*** 108 F.3d 625, 627 (5th Cir.1997). "Dismissal with prejudice is a drastic remedy to which a court may resort only in extreme situations where there is a clear record of delay or contumacious conduct by the plaintiff." ***Id.*** Below is a discussion of several factors to aid the Court in exercise of its discretion.

The introduction to the scheduling order indicated that the scheduling order was being entered in light of Judge Garcia's affirmance in the *Acuna* case of the order enforcing the scheduling order. Plaintiffs are represented by the same counsel as the plaintiffs in the *Acuna* case. Therefore, plaintiffs were well. informed as to the requirements of the scheduling order. Indeed, the order enforcing the scheduling order and the order affirming it each provided detailed discussions of the requirements of the scheduling order and identified specific reasons why plaintiffs' submissions in the *Acuna* case were inadequate.

Despite being well-informed as to the requirements of the scheduling order, plaintiffs submitted a single affidavit that is nearly identical to the affidavits initially submitted in the *Acuna* case. Counsel for plaintiffs knew that such an affidavit would be found deficient because the order enforcing the scheduling order set forth the reasons why such an affidavit is deficient. A footnote in plaintiffs' response to the motion to dismiss indicates that plaintiffs were aware of the requirements of the scheduling order:

> "It is axiomatic that plaintiffs in this case, represented by the same attorney, will only be able to file affidavits which are similar to those filed in *Acuna,* since every effort was made to strictly

> comply with the Magistrate Judge's order therein. It is also anticipated that the same Magistrate Judge would find those affidavits insufficient and again recommend dismissal."

Response, p. 2, n.1. In that footnote, plaintiffs assert that they made every effort to comply with the scheduling order in *Acuna*. In *Acuna*, plaintiffs initially submitted affidavits by a medical doctor. After the issuance of the order enforcing the scheduling order, plaintiffs made another attempt to comply by submitting more detailed affidavits from experts in different fields. Although the second submission of affidavits in *Acuna* reflect a greater expenditure of effort, they were found to be deficient because they did not provide an individualized showing of causation. In this case, however, plaintiffs did not put forth the level of effort as was done in the *Acuna* case. Instead, plaintiffs made little effort to comply with the January 23, 1998 scheduling order in this case, as is shown by the August 24, 1997 affidavit submitted to the defendants. Based on counsel's knowledge of the requirements of the scheduling, the footnote in plaintiff's response, and the date of the affidavit submitted by plaintiffs, it is clear that plaintiffs had no intention of adequately complying with the scheduling order in this case.

Plaintiffs argue that an extension of time is needed to comply with the scheduling order, namely until 90 days after Judge Garcia rules on the motion to dismiss in *Acuna*. A proper request for additional time to comply with the scheduling order should include a description of the efforts made to comply, along with an explanation as to what remains to be done to fully comply. No such

request was made. Since the request for additional time is hinged upon the ruling on the motion to dismiss in *Acuna*, the request provides further indication that plaintiffs did not intend to adequately comply with the scheduling order. Instead, plaintiffs want to delay the progress of this case until a final pronouncement from Judge Garcia regarding the *Acuna* case is issued. However, Judge Garcia's affirmance of the order enforcing the scheduling order clearly establishes that Judge Garcia supports the requirement of an individualized showing of causation.

Plaintiffs' attempt to comply with the scheduling order is extremely deficient, and they have failed to provide an excuse for the delay they have caused. Plaintiffs have given a clear indication that they did not intend to adequately comply with the scheduling order. In light of that, the undersigned believes that plaintiffs would not make a good faith effort to comply with the scheduling order if given another chance. For these reasons, the undersigned believes that plaintiffs' delay and lack of intent to comply with the scheduling order favors dismissal.

If the case is allowed to proceed, then defendants will suffer great prejudice. Defendants will be required to expend extensive time and money defending broad, unspecified claims as to which no preliminary showing of liability or damages has been made. If this case were to proceed to the discovery process, it is certain that defendants would request identification of each plaintiff's specific injuries, the specific cause of the injuries and the facilities or operations of the defendants that substantially contributed to the cause. If plaintiffs' experts are not able to provide that information, then plaintiffs's

discovery responses will not facilitate a firm and reliable basis upon which defendants can build their defense. Based upon plaintiffs' failure to provide the prima facie evidence at this stage, the Court has no reason to believe they will ever be able to produce that information. Therefore, the undersigned believes that the prejudice to defendants favors dismissal.

Related to the factor of prejudice is the interference with the judicial process. If discovery were to proceed, defendants would most likely file motions to compel the identification of each plaintiff's specific injuries, the specific cause of the injuries and the facilities or operations of the defendants that substantially contributed to the cause. As there are approximately 400 plaintiffs in this case, the effect on the judicial process would be enormous. At some point in this litigation process, the Court will be required to address the issue of whether plaintiffs have sufficiently identified each plaintiff's specific injuries, the specific cause of the injuries and the facilities or operations of the defendants that substantially contributed to the cause. Addressing this issue later in the litigation process will certainly consume more judicial resources. Considering the demands of a mass-tort case upon the Court, in light of the information available to plaintiffs' experts, the undersigned believes that the interference to the judicial process that would be caused by allowing this case to proceed to discovery favors dismissal for failure to comply with the scheduling order.

The undersigned notes that the burden on plaintiffs was clearly set forth in the scheduling order. Plaintiffs are represented by the same counsel as the plaintiffs in *Acuna*, so they were well-informed as to the requirements

of the scheduling order. The scheduling order indicated that it was being imposed as a result of Judge Garcia's affirmance in the *Acuna* case of the order enforcing the scheduling order. Also, the scheduling order provided that any deficiencies in the affidavits submitted by plaintiffs would be the subject of a motion like the one under consideration. ***Sched. Order***, docket no. 19, p. 3. Only plaintiffs are responsible for the failure to provide affidavits from experts as required by the scheduling order. The undersigned believes that these factors favor dismissal.

It is inconceivable how a lesser sanction would be effective because what would remain would be an inadequate showing of causation. As discussed above, proceeding to discovery with an inadequate showing of causation will result in the creation of numerous problems of the same character requiring the expenditure of more judicial resources at a later stage in the litigation process. Therefore, the undersigned believes that the ineffectiveness of a lesser sanction favors dismissal.

In regard to property damage claims, plaintiffs completely failed to submit supporting affidavits and plaintiffs did not address such claims in their response to the motion. Therefore, the undersigned concludes that all property damage claims should be dismissed under Rule 16(f) for failure to comply with the scheduling order.

Rule 41(b) provides additional authority for dismissing plaintiffs' property damage claims. Rule 41(b) of the Federal Rules of Civil Procedure authorizes dismissal of an action or of any claim against the defendant for failure of the plaintiff to prosecute or to comply with the federal

rules or any court order. Clearly, a federal court can dismiss an action for failure to prosecute to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the district courts. ***Link v. Wabash Railroad Co.***, 370 U.S. 626, 629-30, 82 S.Ct. 1386, 1388, 8 L.Ed.2d 734 (1962). Such a dismissal will be reversed only if the trial court has abused its discretion. ***Id.*** at 633, 82 S.Ct. at 1390; ***Dorsey v. Scott Wetzel Services, Inc.***, 84 F.3d 170, 171 (5th Cir. 1996). The failure to comply with court orders can warrant dismissal for lack of prosecution. ***Long v. Simmons***, 77 F.3d 878, 879 (5th Cir. 1996). As a result of plaintiffs' failure to submit any affidavits regarding property damage claims, such claims should be dismissed under Rule 41(b) for failure to prosecute.

Conclusion

Plaintiffs failed to comply with the scheduling order because they submitted a single affidavit by an expert that did not appropriately identify (1) each plaintiff's injuries, (2) the materials or substances that caused each injury, or (3) the operations of defendants that substantially contributed to each plaintiff's injuries. Upon consideration of the appropriate criteria, the sanction of dismissal of all personal injury claims under Rule 16(f) is appropriate.

Plaintiffs failed to submit any affidavit concerning their remaining claims, which are property damage claims, despite being well-informed of the requirement to do so. Therefore, all property damage claims should be dismissed under Rule 16(f) for failure to comply with the

scheduling order, and under Rule 41(b) for failure to prosecute.

This Court does not take lightly the impact that dismissal has on plaintiffs in this case. Perhaps some of the individual plaintiffs have suffered injuries at the hands of one or more defendants. However, despite being well-informed of the requirements of the scheduling order as a result of plaintiffs' counsel's experience in the *Acuna* case, plaintiffs have failed to provide sufficient preliminary information of any defendants' liability or any plaintiffs' damages resulting therefrom. It is truly unfortunate that they have refused to comply with the scheduling order on the basis of their belief that the burdens imposed are unfair. What would be unfair is to require each defendant to defend against every claim by every plaintiff, when it is clearly within plaintiffs' ability at this time to specify what injuries they suffered, how they were incurred, and who inflicted them.

It is reasonable to assume that plaintiffs have chosen their path, knowing that the requested information would have revealed that many plaintiffs cannot establish liability or damages. Plaintiffs have apparently decided to stand or fall as a group, rather than present the specific information as ordered by the Court. Thus, those with potentially meritorious claims are dragged down with those whose claims should never have been brought. Should plaintiffs decide to take seriously their responsibility to specify their individual claims, they should be allowed, even now, to do so. However, in the absence of the specific information, which the Court has directed plaintiffs to provide, further prosecution of this case is unwarranted.

RECOMMENDATION

It is the recommendation of the Magistrate Judge that defendants' motion to dismiss should be **GRANTED.** All of plaintiffs' personal injury claims should be **DISMISSED** under Rule 16(f) for failure to comply with the scheduling order, and plaintiffs' remaining claims, which are the property damage claims, should be **DISMISSED** under Rule 16(f) for failure to comply with the scheduling order, and under Rule 41(b) for failure to prosecute.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge.*** A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party

from a *de novo* determination by the district court. *See* ***Thomas v. Arn,*** 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. ***Douglass v. United Services Automobile Association,*** 79 F.3d 1413, 1428 (5th Cir. 1996).

SIGNED this 4th day of May, 1998.

/s/ John W. Primomo
JOHN W. PRIMOMO
United States
Magistrate Judge

SUBCHAPTER B. ADMINISTRATIVE PROVISIONS

§ 401.011. Radiation Control Agency

(a) The Texas Department of Health is the Texas Radiation Control Agency.

(b) The department shall exercise the powers and duties under this chapter for the protection of the occupational health and safety and the environment.